Sunshine Act Meetings

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Friday, January 15, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

LEGAL SERVICES CORPORATION

Board of Directors Annual Meeting

TIME AND DATE: The Legal Services Corporation Board of Directors will hold its annual meeting on January 29, 1993. The meeting will commence at 9:30 a.m.

PLACE: The Legal Services Corporation, 750 1st Street, N.E., 11th Floor, The Board Room, Washington, D.C. 20002, (202) 336–8800.

STATUS OF MEEETING: *Open*, except that a portion of the meeting may be closed if a majority of the Board of Directors votes to hold an executive session. At the closed session, pursuant to receipt of the aforementioned vote, the Board will consider and vote on approval of the draft minutes of the executive session held on December 7, 1992. In addition, the Board will hear and consider the report of the General Counsel on litigation to which the Corporation is a party. Further, the Board will hear and consider its Special Counsel's report on the status of the matter *Gawler* v. *LSC, et al.* Finally, the Board will be consulted by the President regarding certain personnel-related matters. The closing will be authorized by the relevant sections of the Government in the Sunshine Act [5 U.S.C. Sections 552b(c)(2)(5), (6), and (10)], and the corresponding regulation of the Legal Services Corporation [45 C.F.R. Section 1622.5(a), (d), (e), and (h)].[1] The closing will be certified by the Corporation's General Counsel as authorized by the above-cited provisions of law. A copy of the General Counsel's certification will be posted for public inspection at the Corporation's headquarters, located at 750 First Street, N.E., Washington, D.C., 20002, in its eleventh floor reception area, and will otherwise be available upon request.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda.
2. Approval of Minutes of December 7, 1992 Meeting.
3. Election of Officers.
   a. Election of Chairperson.
   b. Election of Vice Chairperson.
4. Formation of Standard Operating Board Committees.
   a. Audit and Appropriations Committee;
   b. Office of the Inspector General Oversight Committee;
   c. Operations and Regulations Committee; and
   d. Provision for the Delivery of Legal Services Committee.
5. Formation of Special Board Committees.
   a. Special Reauthorization Committee.
   b. Other.
6. Status Report on the Competition Effort.
7. Presentation by Representatives of the American Association of Law Schools on the Continued Funding of Law School Clinical Programs.
8. Chairman's and Member's Reports.
9. Consideration of Operations and Regulations Committee Report.
   a. Consideration of Amendments to Sections 1610 and 1611 of the Corporation's Regulations.

OPEN SESSION: (Continued)

   b. Consideration of Amendment to Section 1612 of the Corporation's Regulations.
10. Consideration of Office of the Inspector General Oversight Committee Report.
11. Consideration of Provision for the Delivery of Legal Services Committee Report.
12. Consideration of Audit and Appropriations Committee Report.
13. Consideration of Special Reauthorization Committee Report.
14. President's Report.
15. Inspector General's Report.

CLOSED SESSION:

16. Consideration of Board's Special Counsel's Report on the Matter of *Gawler* v. *LSC, et al.*
17. Consideration of the General Counsel's Report on Pending Litigation to which the Corporation is a Party.
18. Consultation with Board by President on Personnel-Related Matters.
19. Approval of Minutes of Executive Session Held on December 7, 1992.

OPEN SESSION: (Resumed)

20. Consideration of Other Business.

CONTACT PERSON FOR INFORMATION:
Patricia Batie (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate individuals who are blind or have visual impairment.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Dated Issued: January 13, 1993.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 93–1229 Filed 1–13–93; 3:54 pm]

BILLING CODE 7050–01–M

[1] As to the Board's consideration and approval of the draft minutes of the executive session(s) held on the above-noted date(s), the closing is authorized as noted in the *Federal Register* notice(s) corresponding to that/those Board meeting(s).

federal register

Friday
January 15, 1993

Part II

Department of Labor

Office of the Secretary

29 CFR Part 34

Implementation of the Nondiscrimination and Equal Opportunity Requirements of the Job Training Partnership Act of 1982; Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 34

Implementation of the Nondiscrimination and Equal Opportunity Requirements of the Job Training Partnership Act of 1982

AGENCY: Office of the Assistant Secretary for Administration and Management, Labor.

ACTION: Final rule.

SUMMARY: This rule implements the nondiscrimination and equal opportunity provisions of the Job Training Partnership Act of 1982, as amended (JTPA). Under JTPA, the Department of Labor (DOL) provides financial assistance to certain recipients, for the purposes of establishing programs to meet the job training needs of youth and adults facing serious barriers to employment. The nondiscrimination and equal opportunity provisions of JTPA prohibit discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA. The Job Training Reform Amendments of 1992 amended JTPA to impose a statutory deadline for final regulations implementing the nondiscrimination and equal opportunity provisions of JTPA. As amended, JTPA provides that such regulations be issued within 90 days of the enactment date of the Job Training Reform Amendments of 1992.

This rule clarifies the application of the nondiscrimination and equal opportunity provisions of JTPA and provides uniform procedures for implementing them. The rule applies to recipients of Federal financial assistance under JTPA. Recipients are defined as entities to which Federal financial assistance under any title of JTPA is extended directly or through the Governor or another recipient. The rule imposes general nondiscrimination and equal opportunity requirements, as well as certain affirmative obligations, such as data collection and recordkeeping requirements.

This rule does not add significantly to the responsibilities of JTPA recipients. Rather, this rule generally codifies and consolidates requirements to which JTPA recipients are subject under the nondiscrimination and equal opportunity provisions of other Federal financial assistance laws and regulations.

EFFECTIVE DATE: February 16, 1993.

ADDRESSES: Copies of this final rule are available in the following alternative formats: large print; electronic file on computer disk; and audio tape. Copies may be obtained from the Department of Labor, Directorate of Civil Rights, 200 Constitution Ave., NW., N. 4123, Washington, DC 20210 or by calling (202) 219–8927 (VOICE) or (202) 219–7090 (TDD).

FOR FURTHER INFORMATION CONTACT: Annabelle T. Lockhart, Director, Directorate of Civil Rights, (202) 219–8927 (VOICE) or (202) 219–7090 (TDD).

SUPPLEMENTARY INFORMATION:

I. Background

Section 167 of JTPA contains the nondiscrimination and equal opportunity provisions of JTPA, which prohibit discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA. As amended by the Job Training Reform Amendments of 1992, JTPA provides that final regulations implementing section 167 of JTPA be issued within 90 days of the enactment date of the Job Training Reform Amendments of 1992.

Secretary's Order 2–81, section 5a(2), authorizes the Assistant Secretary for Administration and Management (OASAM), working through the Director, Office of Civil Rights (OCR), now Directorate of Civil Rights (DCR), to establish and formulate all policies, standards and procedures, as well as to issue rules and regulations, governing the civil rights enforcement programs under grant-related nondiscrimination statutes. Secretary's Order 2–85 similarly delegates to OASAM, working through the Director, OCR, now DCR, exclusive authority for the implementation and enforcement of the nondiscrimination and equal opportunity provisions of JTPA.

Because JTPA recipients are recipients of Federal financial assistance, such recipients are subject to the requirements of 29 CFR parts 31 and 32, implementing the nondiscrimination and equal opportunity provisions of title VI of the Civil Rights Act of 1964, as amended (title VI), and section 504 of the Rehabilitation Act of 1973, as amended (section 504).

In the absence of regulations implementing section 167 of JTPA, and pursuant to authority delegated to OASAM by the Secretary, DCR has processed complaints of discrimination prohibited by JTPA under 29 CFR parts 31 and 32. Similarly, for the purposes of monitoring compliance with section 167 of JTPA, DCR has utilized the recordkeeping requirements and other affirmative obligations already imposed pursuant to 29 CFR parts 31 and 32. Thus, while this rule provides important and needed clarification, codification, and consolidation of responsibilities and procedures applicable to the enforcement of the nondiscrimination and equal opportunity provisions of JTPA, it does not generally impose substantively new obligations or call for significant changes in procedure.

II. Rulemaking History

On October 19, 1992, DOL published a notice of proposed rulemaking (NPRM), 57 FR 47690, setting forth proposed 29 CFR part 34 and soliciting public comment on the following topics: the addition of applicant information to the Standardized Program Information Record (SPIR); the nature of any costs, other than those involved in satisfying recordkeeping obligations, imposed by the rule; the proposed complaint processing procedure; additional steps that could be taken to minimize any economic burden on small businesses; and the feasibility of requesting certain information from grant applicants.

Section IV of the Supplementary Information, below, addresses comments concerning specific sections of the proposed rule. In particular, the analysis of § 34.24 discusses comments received concerning the addition of applicant information to the SPIR. Comments concerning specific costs imposed by the rule other than those related to recordkeeping are addressed in the applicable section analyses. Comments concerning the proposed complaint procedure are addressed in the analysis of § 34.42. No commenters specifically recommended steps to minimize the economic burden on small entities or addressed the feasibility of requesting certain information from grant applicants.

The comment period ended November 3, 1992. In order to have a reasonable opportunity to comply with the statutory deadline imposed by the Job Training Reform Amendments of 1992, it was necessary to limit the notice and comment period to 15 days. However, to ensure that affected parties were aware of the proposed rule and had a reasonable opportunity to comment, DCR distributed copies of the NPRM directly to Governors, JTPA and State Employment Security Agency Administrators, State Equal Opportunity Officers, and pertinent private interest groups.

In response to the NPRM, DOL received 46 comments from interested groups and individuals. In many

instances, comments were submitted by State JTPA agencies on behalf of their recipients or by Private Industry Councils on behalf of their Service Delivery Areas.

These comments have been analyzed and considered in the development of this final rule.

Copies of the written comments will remain available for public inspection during normal business hours at the Directorate of Civil Rights, U.S. Department of Labor, 200 Constitution Avenue, NW., room N–4123, Washington, DC, 20210. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment, call (202) 219–8927 (VOICE) or (202) 219–7090 (TDD).

III. Overview of the Rule

Subpart A—(a) provides definitions, (b) delineates statutory coverage, (c) establishes enforcement authority, and (d) sets out nondiscrimination and equal opportunity provisions applicable to recipients.

Subpart B—sets out the recordkeeping requirements and other affirmative obligations of recipients.

Subpart C—describes the Governor's supplemental responsibilities to implement the nondiscrimination and equal opportunity requirements of JTPA.

Subpart D—describes complaint handling and compliance review procedures.

Subpart E—contains the Federal procedures for effecting compliance, including: (a) actions DOL will take upon making a finding of noncompliance for which voluntary compliance cannot be achieved; (b) the rights of parties upon such a finding; and (c) hearing procedures.

IV. Section-by-Section Analysis

Subpart A—General Provisions

Section 34.1 Purpose; Application

This section describes the purpose and application of the rule.

The purpose of the rule is to implement section 167 of JTPA, which contains the nondiscrimination and equal opportunity provisions of JTPA. Section 167 of JTPA prohibits discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA. Issuance of this rule was statutorily mandated by the Job Training Reform Amendments of 1992, which amended section 167 of JTPA to require that the Department issue final regulations implementing section 167 within 90 days of the passage of the Job Training Reform Amendments of 1992.

As revised, this part applies to recipients only, as defined in § 34.2. The term recipient is defined to mean any entity to which Federal financial assistance under any title of JTPA is extended, either directly or through the Governor or through another recipient (including any successor, assignee, or transferee of a recipient), but excluding the ultimate beneficiary of the Federal assistance and the Governor. The scope of the rule has been re-defined to focus on the obligations of recipients. The NPRM contained references to entities, other than recipients, operating a program or activity. The final rule no longer contains a distinction between recipients and other entities operating a program or activity, but rather addresses the obligations of recipients only.

This change has been made for several reasons. The focus on recipient responsibilities creates a simplified rule, which more accurately reflects the actual focus of DCR's compliance activities. The revised rule also provides for greater clarity within the regulated community concerning the coverage of the rule. A number of commenters on the NPRM indicated confusion regarding the proposed rule's coverage of entities other than recipients. Some commenters also questioned the availability of practicable enforcement mechanisms to ensure compliance with the nondiscrimination and equal opportunity provisions of the rule by non-recipient entities.

As in the NPRM, subpart A of this part outlines the general nondiscrimination and equal opportunity provisions of the rule. As noted above, the application of the rule, including subpart A, is limited to recipients, as defined in § 34.2. Subpart A also addresses the particular application of the rule to the employment practices of a recipient. As in the NPRM, subparts B–D of this part contain the recordkeeping requirements and other affirmative obligations pertinent to recipients.

Recipients of Federal financial assistance under JTPA are recipients of Federal financial assistance, and therefore are subject to the applicable nondiscrimination and equal opportunity provisions of title VI of the Civil Rights Act of 1964, as amended (title VI) and section 504 of the Rehabilitation Act of 1973, as amended (section 504), and their respective implementing regulations at 29 CFR parts 31 and 32. Several commenters appeared to be unaware of the obligation of recipients of Federal financial assistance under JTPA to comply with laws and regulations pertaining to recipients of Federal financial assistance.

In order to eliminate the burden of complying with overlapping regulatory requirements, the rule provides that a recipient's compliance with this rule constitutes compliance with 29 CFR part 31 and with subparts A, D, and E of 29 CFR part 32. However, this rule does not incorporate all of the requirements contained in 29 CFR part 32. Therefore, recipients complying with this rule remain responsible for the obligations imposed by subparts B and C and Appendix A of 29 CFR part 32, which pertain to employment practices and employment-related training, program accessibility, and accommodations under section 504.

For recipients who receive any funding from the Department under JTPA, whether or not funds under JTPA constitute their sole source of funding from the Department, compliance with this part shall constitute compliance under 29 CFR part 31 and subparts A, D, and E of 29 CFR part 32.

In addition, recipients that are also public entities or public accommodations as defined by titles II and III of the ADA, should be aware of the obligations imposed pursuant to those titles.

This rule does not apply: to programs or activities exclusively funded by DOL under laws other than JTPA; to contracts of insurance and guaranty; to federally-operated Job Corps Centers; or to assistance provided to individuals who are ultimate beneficiaries. One commenter objected to these exclusions, questioning why "SDAs will be held accountable to far-reaching and expensive standards, while other entities are exempt." The rule implements the nondiscrimination and equal opportunity provisions of JTPA and, therefore, applies only to recipients of JTPA funds, as defined by this part. Federally-operated Job Corps Centers are not "exempt" from coverage under title VI or section 504; rather, they are subject to the nondiscrimination and equal opportunity regulations of the Federal department operating the Job Corps Center.

Section 34.2 Definitions

To the extent possible, the definitions contained in the rule are consistent with similar terms used in regulations implementing the nondiscrimination and equal opportunity provisions of other legislation providing Federal financial assistance. Similarly, to the extent feasible, the rule uses the terms contained in JTPA program regulations

issued by the Employment and Training Administration (ETA) within the Department. Furthermore, the rule specifically employs the definitions of applicant, eligible applicant, and participant included in the Standardized Program Information Record (SPIR). A notice concerning the data elements to be included in the SPIR was published November 12, 1992 in the Federal Register, 57 FR 53824. A number of commenters on the NPRM expressed dissatisfaction with apparent discrepancies between the definitions of applicant and participant contained in DCR's proposed rule and in the SPIR proposed by ETA on March 12, 1992, 57 FR 8820. The definitions of applicant, eligible applicant, and participant contained in the final rule are now substantively identical to the SPIR definitions of those terms.

Some commenters expressed disapproval of any difference in the use of certain definitions in the NPRM and in ETA regulations. Because this rule is designed for use in civil rights compliance and enforcement activities, rather than for programmatic purposes, it is not possible to use identical definitions. Therefore, the rule defines and uses certain terms as terms of art, such as JTPA-funded program or activity and recipient.

The term JTPA-funded program or activity is used as a term of art to mean a program, operated by a recipient and funded under JTPA for the provision of services, financial aid, or other benefit to individuals. One commenter expressed the view that services purchased by a participant with JTPA needs-based payments should not constitute a JTPA-funded program, now termed a JTPA-funded program or activity. A JTPA-funded program or activity, as defined in § 34.2, does not cover services purchased by a participant.

The term recipient is used as a term of art that includes any entity, public or private, that receives funding from the Department under any title of JTPA, directly or through the Governor or another recipient. The term recipient includes, but is not limited to, State-level agencies that administer JTPA-funded programs or activities, State Employment Security Agencies (SESAs), Private Industry Councils (PICs), SDA grant recipients or administrative entities, substate grantees, service providers, Job Corps Centers, and National Program recipients. The term recipient does not include federally operated Job Corps Centers.

In the final rule, the definition of recipient has been revised to exclude the Governor. This is a technical change to provide greater clarity and precision and does not represent any substantive change in the responsibilities applicable to recipients or to the Governor. As in the proposed rule, the final rule provides that the Governor has specific obligations, outlined in subpart C of this part, to ensure that recipients comply with the nondiscrimination and equal opportunity provisions of JTPA and this part.

In a related technical change, the term subrecipient has been deleted from the final rule as superfluous and confusing. As commenters indicated, the term subrecipient served no function, since the proposed rule already included subrecipients within the definition of recipient and provided that all obligations of recipients applied to subrecipients, unless otherwise provided in the rule. As in the proposed rule, the final rule exempts service providers and small recipients from certain obligations imposed by the rule.

The definitions of disability and individual with a disability have been revised for consistency with section 504 of the Rehabilitation Act of 1973, as recently amended by the Rehabilitation Act Amendments of 1992. Further, consonant with the Rehabilitation Act Amendments of 1992, the Job Training Reform Amendments of 1992 and the ADA, this part uses the term disability in place of the term handicap. The two terms are intended to have identical meanings.

One commenter criticized the definition of disability contained in the proposed rule, on the ground that it was excessively broad. However, the definition is not exclusive to this rule, but rather is substantively identical to that contained in section 504 of the Rehabilitation Act, as amended, to which recipients of Federal financial assistance, including JTPA funds, are subject. Because the rule pertains to nondiscrimination and equal opportunity on the basis of disability, rather than program eligibility, the definition of disability is necessarily different from that used for the purposes of making program determinations.

Several comments indicated a need for clarification of the term auxiliary aids and services; therefore, a definition of the term has been added to the final rule. Auxiliary aids and services pertain specifically to communications. The obligations of recipients concerning communications with individuals with disabilities are outlined in § 34.6.

Section 34.3 Discrimination Prohibited

This section sets forth a general statement of prohibited discrimination to the effect that no person, on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA, shall be excluded from participation in, denied the benefits of, or subjected to discrimination under a JTPA-funded program or activity. The suggestion of one commenter that several of these grounds be deleted from inclusion in the final rule has not been adopted, because the section implements the specific statutory prohibitions on discrimination mandated by section 167 of JTPA.

Section 34.4 Specific Discriminatory Actions Prohibited on the Ground of Race, Color, Religion, Sex, National Origin, Age, Political Affiliation or Belief, Citizenship, or Participation in JTPA

For the purposes of this section, prohibited ground is defined to mean race, color, religion, sex, national origin, age, political affiliation, citizenship, or participation in JTPA. Specific discriminatory actions that are prohibited on the ground of disability are covered in § 34.5.

This section delineates specific actions that are prohibited by the nondiscrimination and equal opportunity provisions of JTPA. In addition to the specific actions prohibited under paragraphs (a) (1)–(9) of this section, paragraph (a)(10) of the section provides that a recipient may not "otherwise limit on a prohibited ground an individual in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service, or training." Thus, the enumeration of specifically prohibited actions is not intended to imply the permissibility of actions not specifically enumerated. One commenter pointed out that sexual harassment was not specifically included as a prohibited action. Sexual harassment constitutes a form of discrimination on the basis of sex and is therefore prohibited under the nondiscrimination and equal opportunity provisions of JTPA and this part.

One commenter expressed the view that the list of prohibited grounds and actions contained in this section was excessive. The list of grounds on which it is prohibited to discriminate is contained in section 167 of JTPA itself; the rule implements, but does not extend, the statutory prohibitions. Further, the list of prohibited actions is essentially identical to that contained in the regulations implementing title VI. As noted in the discussion of § 34.1,

recipients of Federal financial assistance from DOL, including funds under JTPA, are already subject to these prohibitions.

One commenter requested clarification as to whether the rule's prohibition on discrimination on the ground of participation in JTPA would preclude recipients from adopting policies that would restrict the access and/or delivery of services to prior participants. The rule's prohibition on discrimination on the ground of participation in JTPA implements § 167(a)(4) of JTPA, which provides that individuals who are participants in activities supported under JTPA shall not be discriminated against solely because of their status as such participants. The Department does not consider reasonable restrictions on serving prior participants to constitute discrimination prohibited by the nondiscrimination and equal opportunity provisions of JTPA or this part.

Paragraph (d) of this section permits the exclusion of an individual because he or she is not a member of the class of beneficiaries to which participation in the program is limited by Federal statute or executive order. One commenter objected to this provision, on the ground that paragraph (d) "specifically allows illegal discrimination against persons who are not members of protected classes." This perception is incorrect; the provision does not permit "illegal discrimination," but rather is included to clarify what does and does not constitute illegal discrimination. The provision's use of the phrase "Federal statute or executive order" is intended to indicate that a Federal statute, such as the JTPA, that identifies a population which is eligible for participation in the federally-funded program and which specifically provides for the specific training needs of certain segments of that population, does not per se violate the nondiscrimination and equal opportunity provisions of JTPA or this part.

Section 34.5 Specific Discriminatory Actions Prohibited on the Ground of Disability

This section provides that a recipient shall not, directly or through contractual, licensing, or other arrangements, take certain actions with regard to individuals with disabilities. The list of actions prohibited by this section is substantially the same as contained in 29 CFR 32.4, but has been revised to reflect revisions to section 504, as amended by the Rehabilitation Act Amendments of 1992.

One commenter asked for clarification regarding the absence in the proposed rule of the term reasonable accommodation as applied to employment. As provided in § 34.1(d)(2), this rule does not affect in any way the obligation of recipients to comply with subparts B and C and appendix A of 29 CFR part 32. Thus, the rule does not purport to provide comprehensive guidance regarding employment-related obligations to provide reasonable accommodation. Such guidance is provided in 29 CFR part 32, subpart B, which covers employment practices and employment-related training and which specifically discusses the concept of reasonable accommodation, and in 29 CFR part 32, appendix A, which provides guidance and technical assistance regarding types of accommodations. Recipients that are also employers covered by titles I and II of the ADA should also be aware of obligations imposed pursuant to those titles.

For greater clarity, a subsection (e) has been added to § 34.7, Employment practices, to indicate that § 34.7 does not constitute an exhaustive list of employment-related nondiscrimination and equal opportunity obligations on the ground of disability.

Paragraph (g) of this section provides that the exclusion of an individual without a disability from the benefits of a program limited by Federal statute or Executive Order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive Order to a different class of individuals with disabilities is not prohibited by this part. This provision is essentially identical to the provision contained in 29 CFR 32.4.

A new paragraph (h) has been added to this section to clarify that a recipient is not required to provide to individuals with disabilities: personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance with eating, toileting, or dressing. The standard imposed by this paragraph is the same as imposed pursuant to 28 CFR 35 (DOJ) regulations implementing title II, subtitle A of ADA). New paragraph (h) replaces a similar provision in § 34.6(b)(2) of the NPRM.

Section 34.6 Communications With Individuals With Disabilities

This section outlines the responsibilities of recipients with regard to communications with individuals with disabilities and the provision of auxiliary aids or services.

Paragraph (a) of this section requires recipients to take appropriate steps to ensure that communications with beneficiaries, applicants, eligible applicants, participants, applicants for employment, employees and members of the public who are individuals with disabilities "are as effective as communications with others." These provisions, including the phrase "as effective as communications with others," are substantially the same as contained in the Communications provision of title II of the ADA, as implemented by 28 CFR part 35 (DOJ). Some commenters asked that the phrase "as effective" be changed to a more specific standard. The Department has not adopted this suggestion for several reasons. The use of a term other than that used in the ADA and in 28 CFR part 35 could give the erroneous impression that the Department is imposing a standard for required communications that differs from that required under the ADA. Furthermore, the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved. Factors to be considered in determining the exact type of auxiliary aid or service include, but are not limited to, the context in which the communication is taking place, the number of people involved, and the importance of the communication.

Section 34.6(c) requires that where a recipient communicates by telephone with beneficiaries, applicants, eligible applicants, participants, applicants for employment and employees, such recipient shall use TDDs or "equally effective communications systems." This requirement is substantively identical to the requirement imposed under subtitle A, title II of the ADA. One commenter interpreted paragraph (c) of this section as requiring the acquisition of TDDs and objected on the grounds that complying with such a requirement would result in prohibitive expense. However, this section does not expressly mandate the purchase of TDDs. A recipient which does not have a TDD and which needs to communicate with an individual who uses a TDD, or vice versa, may be able to use a relay service that permits communications between individuals who communicate by TDD and individuals who communicate by the telephone alone. However, TDDs should be available where services provided by telephone are a major function of the JTPA-funded program or activity.

Former paragraph (b)(2) of this section, concerning "individually prescribed devices," "readers for personal use or study," or "other devices of a personal nature," has been deleted from this section. A revised version of this provision is now contained in paragraph (h) of § 34.5.

Section 34.7 Employment Practices

This section describes the application of this part to the employment practices of a recipient. Discrimination on the ground of race, color, religion, sex, national origin, age, disability or political affiliation or belief is prohibited in the employment practices of JTPA-funded programs or activities.

As provided in §§ 34.1(d)(2) and 34.1(d)(3), this rule does not affect in any way the obligation of recipients to comply with subparts B and C and appendix A of 29 CFR part 32. However, for greater clarity, a subsection (e) has been added to emphasize that § 34.7 does not constitute an exhaustive list of employment-related nondiscrimination and equal opportunity obligations on the ground of disability. Such guidance is provided in 29 CFR part 32, subpart B, which covers employment practices and employment-related training and which specifically discusses the concept of reasonable accommodation, and in 29 CFR part 32, appendix A, which provides guidance and technical assistance regarding types of accommodations.

Recipients that are also employers covered by titles I and II of the ADA should be aware of obligations imposed pursuant to those titles and of technical assistance available from the pertinent Federal enforcement agencies.

Section 34.10 [Reserved]

The provisions contained in this section have been deleted from the final rule because they are duplicative of the provisions contained in § 34.24. Comments concerning former § 34.10 are discussed in the analysis of § 34.24.

Section 34.11 Effect of Other Obligations or Limitations

This section contains the provision that a recipient covered by this part may not exclude individuals from participation or otherwise limit their opportunity to participate in JTPA-funded training programs or activities, based on the perception that it will be unable to place such individuals in jobs after training because of their race, sex, age, disability, or other characteristic identified as a prohibited ground of discrimination. For example, a recipient may not deter a woman who is qualified for a training program in the construction trades from seeking such training, simply because such recipient believes that, after training, it will be difficult to place the woman in a construction job. One commenter objected that this provision does not "give sufficient grounds for excluding an individual from a particular training program where the program would lead to a future job which has a bona fide requirement for a specific gender, age (etc.)." The commenter did not give an example of a training program for a specific job which has such a bona fide requirement. Although Federal discrimination law provides for exceptions based on a bona fide occupational qualification, such exceptions have been interpreted extremely stringently and are generally inapplicable.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

Section 34.20 Assurance Required; Duration of Obligation; Covenants

One commenter asked for clarification regarding how far down the procurement chain the assurance required by this section applies. The assurance requirement applies to each application for Federal financial assistance under JTPA, as defined in § 34.2.

One commenter expressed disapproval of paragraph (c), which concerns the duration and scope of the application of the assurance specified in paragraph (a) of this section, and of paragraph (d), which provides for covenants containing such an assurance. This commenter did not think that receipt of Federal financial assistance under JTPA for the provision of, or in the form of, real property should impose on the recipient any continuing obligation not to discriminate. However, the provisions contained in paragraphs (c) and (d) of this section have been retained in the final rule. They are substantively identical to those currently applicable to recipients of Federal financial assistance pursuant to 29 CFR 31.6(a) and 32.5 (b) and (c). The language of the section has been revised and simplified for greater clarity.

Section 34.21 Equitable Services

This section requires recipients to make efforts to provide equitable services. Such efforts include, but are not limited to, conducting outreach efforts to broaden the composition of the pool of those considered for participation, to include members of both sexes, the various race/ethnicity and age groups, and individuals with disabilities. A number of commenters asked for clarification of the term "equitable services," and were concerned that the section required that services be provided to each group (e.g., individuals with disabilities) in proportion to the group's representation in the eligible population. This section is not intended to impose such a requirement; rather, it requires recipients to make outreach efforts to ensure that members of both sexes, the various race/ethnicity and age groups, and individuals with disabilities have fair access to JTPA-funded programs, activities, or services.

Section 34.22 Designation of Equal Opportunity Officer

This section requires each recipient, other than a small recipient or service provider, to designate an Equal Opportunity Officer responsible for coordinating its obligations under these regulations. This obligation includes responsibility for developing, maintaining and updating the recipient's Methods of Administration pursuant to § 34.33, as well as serving as the recipient's liaison to the Directorate. The requirement imposed by this section is consistent with existing obligations under 29 CFR 32.7, which requires recipients of Federal financial assistance to designate at least one person to coordinate the recipient's compliance efforts under section 504. A similar requirement is contained in DOJ's title VI coordinating rule at 28 CFR 42.410, which requires the assignment of title VI responsibilities to designated State personnel.

The proposed rule provided for the Equal Opportunity Officer to report directly to the recipient's Administrator, Secretary, chief elected official, governing board, Executive Director, "or other comparable body." Several commenters objected to the phrase "or other comparable body" on the grounds that it was insufficiently specific. The final rule has been revised to indicate that the Equal Opportunity Officer is to report directly to the State JTPA Director, Governor's JTPA Liaison, Job Corps Center Director, SESA Administrator, or chief executive officer of the SDA or substate grant recipient, as applicable.

This rule does not require that recipients designate a separate or additional Equal Opportunity Officer to comply with this part, but permits recipients to use their existing Equal Opportunity Officer and staff. Furthermore, this rule does not require that recipients establish a full-time position responsible solely for this part. The duties described in this section could be performed by an individual (or

individuals) who may be assigned other duties.

Paragraph (a) of this section further provides that the Director may require that the Equal Opportunity Officer and his or her staff undergo training, "the expenses of which shall be the responsibility of the recipient." The NPRM used the phrase "the expenses of which will be borne by the recipient." Several commenters objected to this provision, on the grounds that such training should be voluntary and all costs should be borne by DCR. The Department's responsibility to ensure compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part requires that the Director have authority to require necessary training. As a practical matter, however, DCR generally provides the required training free of charge; recipients are usually responsible solely for travel and accommodation costs.

Paragraph (d) of this section provides that service providers, as defined by § 34.2, are not required to designate an Equal Opportunity Officer. Rather, the duties described in this section are the responsibilities of the Governor, the SDA grant recipient or the Substate grantee, as provided in the State's Methods of Administration. A number of commenters expressed approval of this provision, as a means of lessening the burden of compliance on service providers.

Section 34.23 Dissemination of Policy

The proposed rule provided in paragraph (a) of this section that recipients take initial and continuing steps, using the notice language specified in then-paragraph (a)(1) of this section, to notify "the public, applicants, eligible applicants, participants, beneficiaries, referral sources, employees and applicants for employment, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with recipient" that it does not discriminate on any prohibited ground. The prescribed notice language included information concerning the right to file complaints and procedures applicable to complaints.

A number of commenters objected to the requirement that pamphlets and other materials ordinarily distributed to the public contain the specific notice language, particularly the information concerning the right to file complaints. These commenters expressed concern regarding the feasibility of including the full text of the notice in all recruitment and general information publications, many of which are very brief; the necessity of disseminating information concerning the right to file complaints in general materials distributed to members of the public; and the significant expense that would be involved in revising and reprinting all publications to include the full notice.

The final rule has been revised to reflect these comments. Paragraph (a) of the section now requires initial and continuing notice to be given to: applicants, eligible applicants, participants, applicants for employment, employees, and members of the public, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient. Paragraph (a)(2) of this section has been revised to clarify that the notice obligation imposed pursuant to paragraph (a)(1) of this section requires, at a minimum, that the notice specified in paragraph (a)(5) of this section be: posted prominently, in reasonable numbers and places; disseminated in internal memoranda and other written communications; included in handbooks and manuals; and made available to each participant and made a part of the participant's file. The obligation to provide notice to the public no longer requires that recipients include the full notice language in generally-distributed materials. Rather, as discussed below, new paragraph (b) provides for the inclusion of a more concise equal opportunity statement.

New paragraph (a)(3) includes the requirement contained in paragraph (a)(2) of the NPRM that recipients provide the required initial and continuing notice in appropriate formats to individuals with visual impairments. As in the NPRM, the final rule further provides that a record that such notice has been given be made a part of the individual's file. However, the final rule has been revised to indicate that a record that such notice has been given shall be made a part of the "participant's file," rather than "the eligible applicant's file." The change makes clear that the provision does not require the creation of additional "files" on eligible applicants.

In the final rule, paragraph (b) of the section clarifies the obligations of recipients with regard to the general public. Recipients are not required to include the full text of the notice prescribed in paragraph (a)(5) of this section in recruitment brochures and other materials ordinarily distributed to the public, such as pamphlets describing JTPA-funded programs or activities and/or participation requirements. However, recipients must indicate in such generally-distributed publications that the JTPA-funded program or activity is an "equal opportunity employer/program" and that "auxiliary aids and services are available upon request to individuals with disabilities." Where such materials indicate that the recipient may be reached by telephone, they must also state the telephone number of any TDD or relay service used by the recipient pursuant to § 34.6.

Paragraph (b)(2) has been revised similarly to indicate that recipients required by law or regulation to publish or broadcast program information in public media, must ensure that such publications or broadcasts state that the JTPA-funded program or activity in question is an equal opportunity employer/program (or otherwise indicate that discrimination in the JTPA-funded program or activity is prohibited by Federal law), and indicate that auxiliary aids and services are available upon request to individuals with disabilities. These requirements are substantially the same as those imposed by 29 CFR 31.5(d), 29 CFR 32.8(b), and 28 CFR 42.405(c).

The provision formerly contained in paragraph (d) of this section, concerning information in a language other than English, has been revised for greater clarity. New paragraph (c) provides that, where a significant number of the population eligible to be served, or directly affected by a JTPA-funded program or activity, requires service or information in a language other than English, recipients must take reasonable steps to provide, in appropriate languages: (1) Such information; (2) the notice required pursuant to paragraph (a) of this section; and (3) such written materials as are distributed pursuant to paragraph (b) of this section. Several commenters requested that the term "significant number" be defined more specifically. The final rule retains the term "significant number," which is used in the analogous requirement imposed under title VI by DOJ's coordinating rule at 28 CFR 42.405(d)(1). The use of a term other than that used in the DOJ rule could give the erroneous impression that the Department is requiring JTPA recipients to meet a different standard for the provision of materials in languages other than English than is generally imposed on recipients of Federal financial assistance.

Section 34.24 Data and Information Collection; Confidentiality

As indicated in the proposed rule, DCR and ETA have agreed to use, to the extent possible, a joint management

information system, now called the Standardized Program Information Record (SPIR). A notice concerning the data elements to be included in the SPIR was published in the **Federal Register** on November 12, 1992 (57 FR 53824). As the proposed rule indicated, for the purposes of complying with the nondiscrimination and equal opportunity provisions of JTPA and this part, recipients are not required to maintain a recordkeeping system that duplicates the data elements contained in the SPIR. However, at the time the NPRM was published, a proposal concerning data elements to be included in the SPIR had appeared in the **Federal Register**, but the notice had not yet been published. As a consequence, a number of commenters were concerned that the DCR and ETA recordkeeping obligations would not be consistent. These concerns are no longer applicable, since the final rule and the SPIR contain consistent requirements and definitions.

This section has been reorganized for greater clarity. New paragraph (a) of this section provides generally that recipients are not required to submit information and data pursuant to this section that the Directorate can obtain from existing sources, including those of other agencies, if the source is known and can be made available to the Director.

Paragraph (a)(1) of this section sets out the basic requirement that recipients collect and maintain such records, in accordance with procedures prescribed by the Director, as are necessary to determine compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part. Some commenters expressed concern as to the apparently open-ended nature of this provision. This provision states the Director's general authority to prescribe procedures concerning the collection and maintenance of such information as is necessary to determine compliance and thus has been retained in the final rule. New requests for the collection of information that are subject to the Paperwork Reduction Act would be submitted to OMB in accordance with that Act for approval and publication for notice and comment.

Paragraph (a)(2) of this section provides that the records required to be collected and maintained pursuant to paragraph (a)(1) of this section, shall specifically include, but are not limited to, records on the race/ethnicity, sex, age, and, where known, disability status, of each applicant, eligible applicant, participant, terminee, applicant for employment and employee. Pursuant to 29 CFR parts 31 and 32, the Department already requires that recipients maintain much of this information, including data regarding the disability status, where known, of beneficiaries and participants.

With the exception of data on employees and applicants for employment, the information specifically requested under paragraph (a)(2) of this section will be included in the SPIR for most JTPA State programs. Employers are already required to maintain information on the race/ethnicity, sex, and age of employees and applicants for employment pursuant to EEOC regulations.

The proposed rule referred to data concerning disability status "where voluntarily self-identified." In the final rule, this phrase has been changed to "where known." This change has been made for several reasons. "Where known" is the standard applicable for compliance reporting under 29 CFR part 32. For compliance purposes, it is necessary to know, not only the number of individuals who wish to identify themselves as individuals with disabilities, but also the number of individuals who are perceived by the recipient as being individuals with disabilities. Furthermore, it is only permitted to ask questions regarding disability status in certain limited circumstances, e.g., where required to determine eligibility for a federally-assisted program or otherwise required pursuant to a Federal law or regulation. If disability status has been voluntarily self-identified pursuant to such a permitted circumstance, such self-identification can provide the means by which the disability status is "known."

One commenter expressed the view that section 102 of the ADA prohibits any "pre-enrollment inquiries" regarding disability status. Section 102 of the ADA pertains to pre-employment inquiries. It is correct that pre-employment inquiries concerning an individual's disability status are generally prohibited, whether or not responses to such inquiries are voluntary. However, as noted above, this prohibition does not apply to such inquiries as are necessary to determine eligibility for federally assisted programs. Furthermore, a pre-employment inquiry about a disability is permissible if it is required or necessitated by another Federal law or regulation. Section 5.5(c) of the EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, specifically provides that such inquiries as are necessary to determine eligibility for JTPA assistance or for the provision of required special services do not violate the ADA.

Paragraph (a)(1) of the proposed rule contained a provision requiring recipients to ensure that the information collected pursuant to this section be kept separate from the application or other forms and otherwise be stored to maintain confidentiality. Numerous commenters objected to the requirement that such information be kept separate, on the ground that keeping identifying data segregated from the application would require the establishment of two different recordkeeping systems. These commenters expressed full support for goal of keeping the information confidential. In addition, some commenters objected that the purpose of the "separate" requirement would be defeated by the SPIR, which is designed to produce a single record and which mandates the inclusion of such information.

The intent of the "separate" requirement contained in the proposed rule was to ensure the confidentiality of identifying information and to prevent the improper use of such information. The final rule has been revised to require recipients to safeguard the confidentiality of the required information. It does not specifically require that such information be maintained in a separate file. New paragraph (a)(2) of this section retains the requirement of old paragraph (a)(1) of this section, that the information collected pursuant to this part be used only for the purposes of recordkeeping and reporting; determining, where appropriate, eligibility for a JTPA-funded program or activity; determining the extent to which the recipient is operating its JTPA-funded program or activity in a nondiscriminatory manner; or other use authorized by the nondiscrimination and equal opportunity provisions of JTPA or this part.

Re-numbered paragraph (a)(3) of this section requires grant applicants and recipients to notify the Director of any administrative enforcement actions or lawsuits filed against a grant applicant or recipient alleging discrimination on a prohibited ground; to provide a brief description of the findings in any civil rights compliance review or complaint investigation conducted by another Federal agency where a grant applicant or recipient was found in noncompliance. Under paragraph (a)(3)(iii) of this section, each recipient is required to maintain a log containing certain information regarding complaints filed with it under this part, and to submit the information in accordance with procedures determined

by the Director. One commenter objected to the "addition" of the requirements contained in paragraph (a)(3) of this section. These requirements are essentially identical to those currently imposed by the Department pursuant to 28 CFR part 42 (DOJ coordinating regulations implementing title VI).

Paragraph (a)(4) of this section states DCR's authority to request such information and data as are necessary to investigate complaints and conduct compliance reviews concerning discrimination on prohibited grounds other than race/ethnicity, sex, age, and disability, such as national origin, religion, citizenship and political affiliation or belief. One commenter objected to this provision on the grounds that it authorizes "unnecessary 'fishing expeditions or witch hunts.'" The nondiscrimination and equal opportunity provisions contained in section 167 of JTPA are not limited to race/ethnicity, sex, age, and disability, but also include national origin, religion, political affiliation and belief, and for beneficiaries only, citizenship and participation in JTPA. Therefore in order for DCR to be able to fulfill its responsibility to ensure compliance with section 167 of JTPA, DCR must have the authority to request such information and data as are necessary to investigate complaints and conduct compliance reviews concerning discrimination on grounds covered by the JTPA.

As in the proposed rule, the final rule requires recipients to retain records, including records regarding complaints and actions taken thereunder, as well as applicant, eligible applicant, participant, employee and applicant for employment records, for a period of not less than three years. In response to a suggestion made by several commenters, paragraph (c) has been revised to clarify when the three-year retention period begins. Applicant, eligible applicant, participant, terminee, applicant for employment and employee records and such other records as are required by the Director, must be maintained for a period of not less than three years from the close of the applicable program year. Records regarding complaints and actions taken thereunder must be maintained for a period of not less than three years from the date of the resolution of the complaint.

Paragraph (b)(2) of this section provides that "asserted considerations of privacy and confidentiality" shall not be a basis for withholding information from the Directorate and shall not bar the Directorate from evaluating or seeking to enforce compliance with the nondiscrimination or equal opportunity provisions of JTPA or this part. This provision is substantively identical to that imposed by 29 CFR 32.44(c). Several commenters requested deletion of this provision, and in particular the phrase "asserted considerations of privacy and confidentiality." The final rule has not been modified. The provision is necessary to enable the Directorate to fulfill its obligation to ensure that Federal funds under JTPA are not used for discriminatory purposes.

Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of JTPA

Section 34.30 Application

This section provides that subpart C of this part is applicable to State Programs as defined in § 34.2. Section 34.32 provides that, unless the Governor has taken the steps delineated in that section, he or she shall share liability with the recipient for any finding of noncompliance. This section has been revised to clarify that the Governor's liability for any noncompliance on the part of a SESA cannot be waived. Thus, as provided in both the proposed and final rules, the provisions of 34.32 (b) and (c) do not apply to State Employment Security Agency (SESA) programs

Section 34.33 Methods of Administration

This section requires each State to develop a Methods of Administration for State programs, as defined by § 34.2 Several commenters expressed approval of this requirement, observing that it will provide a clear and uniform standard for the implementation of the nondiscrimination and equal opportunity provisions of JTPA and this part.

One commenter requested that the final rule add the words "his or her designee" to paragraph (b)(3) of this section, which provides that the Methods of Administration shall be signed by the Governor. This suggestion has not been adopted, because the definition of the term *Governor* provided in § 34.2 of this part expressly includes the Governor's designee.

This section has been revised to clarify what constitutes the "supporting documentation" required pursuant to paragraph (c)(2)(vi) of this section.

Subpart D—Compliance Procedures

Section 34.40 Compliance Reviews

Paragraph (c)(3) of this section provides that recipients shall be notified through a Letter of Findings of the preliminary findings of a post-approval review. Such Letter of Findings is to be issued within 210 days of the initiation of a post-approval review (except where a Notice to Show Cause is issued as provided in § 34.41(e)). In response to a comment, this provision has been revised to clarify that the 210 day time frame begins with the issuance of a Notification Letter pursuant to paragraph (c)(2) of this section.

Section 34.42 Adoption of Discrimination Complaint Processing Procedures

This section requires each recipient to adopt and publish procedures for processing complaints that allege a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part, regardless of the prohibited ground. Under 29 CFR part 31, individuals alleging complaints of discrimination pursuant to title VI have been required to file complaints directly with the Directorate. Under 29 CFR part 32, however, individuals alleging complaints of discrimination pursuant to section 504, have been required to exhaust local-level procedures before filing with the Directorate. Several commenters expressed approval of the NPRM's provision unifying the procedures applicable to discrimination complaints. These commenters noted that having different procedures for complaints brought under section 504 and title VI had proven confusing.

One commenter objected to the requirement that recipients be required to adopt any complaint processing procedures pursuant to the nondiscrimination and equal opportunity provisions of JTPA and this part. This commenter expressed the view that such procedures create "an unnecessary duplication of grievance processes" already provided pursuant to general JTPA requirements. As indicated above, the requirement that recipients be required to adopt procedures for responding to complaints of discrimination is not new. Furthermore, ETA's JTPA regulations at 29 CFR part 636 expressly provide that part 636 is not applicable to complaints of discrimination pursuant to section 167 of JTPA, but rather that such complaints are to be handled under 29 CFR parts 31 and 32, in accordance with other complaints of discrimination.

Section 34.45 Notice of Violation; Written Assurances; Conciliation Agreements

This section has been reorganized for greater clarity and amended to include new paragraph (c)(1), which expressly

provides that a written assurance must contain documentation that the violations listed in the Letter of Findings, Notice to Show Cause, or Initial Determination, as applicable, have been corrected.

Section 34.47 Notice of Finding of Noncompliance

This section has been reorganized for greater clarity. The final rule provides that when a compliance review or complaint investigation results in a finding of noncompliance, the Director shall so notify the Departmental granting agency and the Assistant Attorney General.

Subpart E—Federal Procedures for Effecting Compliance

Section 34.52 Decisions and Post-termination Proceedings

This section has been reorganized for greater clarity. A new paragraph (b)(1)(vi) has been added to the final rule to provide that, where exceptions to the initial decision and order of the Administrative Law Judge have not been filed, the Secretary may, on his or her own motion, serve notice on the parties that the Secretary shall review the decision.

V. Regulatory Process Matters

Interagency Coordination

The Department of Justice (DOJ), pursuant to Section 1–201 of Executive Order 12250 (45 FR 72995, November 4, 1980), is responsible for coordinating Federal enforcement of nondiscrimination laws in federally assisted programs. Executive Order 12067 (43 FR 28967, July 5, 1978) requires consultation with the Equal Employment Opportunity Commission (EEOC) regarding those provisions of regulations that involve equal employment opportunity. This rule has been reviewed and approved by both DOJ and EEOC.

Executive Order 12291

The Department has determined that this rule is not a "major rule" under Executive Order 12291. It is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

This rule does not substantively change the existing obligation of recipients to apply a policy of nondiscrimination and equal opportunity in employment or services. This rule will not have a significant economic impact on a substantial number of small business entities. Accordingly, a regulatory flexibility analysis pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is not required for this rulemaking.

Paperwork Reduction Act

The information collection requirements imposed pursuant to the rule have been submitted to OMB for review pursuant to the Paperwork Reduction Act. While the majority of recordkeeping obligations imposed by the rule are not new and have previously been approved by OMB, the final rule calls for DCR and ETA to use one management information system, the Standardized Program Information Record (SPIR), to the extent possible. The new paperwork submission reflects this arrangement.

List of Subjects in 29 CFR Part 34

Administrative practice and procedure, Aged, Aliens, Civil rights, Equal educational opportunity, Equal employment opportunity, Grant programs, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements.

Signed at Washington, DC, this 8th day of January, 1993.

Lynn Martin,

Secretary of Labor.

Accordingly, title 29, subtitle A of the Code of Federal Regulations is amended by adding part 34 to read as set forth below:

PART 34—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY REQUIREMENTS OF THE JOB TRAINING PARTNERSHIP ACT OF 1982, AS AMENDED (JTPA)

Subpart A—General Provisions

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

Subpart C—Governor's Responsibilities to Implement the Nondiscrimination and Equal Opportunity Requirements of JTPA

Subpart D—Compliance Procedures

Subpart E—Federal Procedures for Effecting Compliance

Authority: 20 U.S.C. 1681; 29 U.S.C. 794, 1501, 1551, 1573, 1574, 1575, 1576, 1577, 1578, 1579; 42 U.S.C. 2000d et seq., 6101.

Subpart A—General Provisions

§ 34.1 Purpose; application.

(a) *Purpose.* The purpose of this part is to implement the nondiscrimination and equal opportunity provisions of the Job Training Partnership Act of 1982, as amended (JTPA), which are contained in section 167 of JTPA. Section 167 prohibits discrimination on the grounds of race, color, religion, sex, national origin, age, disability, political

affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA. This part clarifies the application of the nondiscrimination and equal opportunity provisions of JTPA and provides uniform procedures for implementing them.

(b) *Application of this part.* This part applies to any recipient, as defined in § 34.2. This part also applies to the employment practices of a recipient, as provided in § 34.7.

(c) *Effect of this part on other obligations.*

(1) A recipient's compliance with this part shall satisfy any obligation of the recipient to comply with 29 CFR part 31, implementing title VI of the Civil Rights Act of 1964, as amended (title VI), and with subparts A, D and E of 29 CFR part 32, implementing section 504 of the Rehabilitation Act of 1973, as amended (section 504).

(2) However, compliance with this part shall not affect any obligation of the recipient to comply with subparts B and C and appendix A of 29 CFR part 32, which pertain to employment practices and employment-related training, program accessibility, and accommodations under section 504.

(3) Recipients that are also public entities or public accommodations as defined by titles II and III of the Americans with Disabilities Act of 1991 (ADA), should be aware of obligations imposed pursuant to those titles.

(4) Compliance with this part does not affect, in any way, any obligation that a recipient may have to comply with Executive Order 11246, as amended, section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), the Equal Pay Act of 1963, as amended (29 U.S.C. 206d), title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621), title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681), the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. 12101 et seq.) and their respective implementing regulations.

(5) This rule does not preempt consistent State and local requirements.

(6) The rule generally codifies and consolidates already existing nondiscrimination and equal opportunity requirements. However, to the extent that this rule imposes any new requirements, it is not intended to have retroactive effect.

(d) *Limitation of Application.* This part does not apply to:

(1) Programs or activities funded by the Department exclusively under laws other than JTPA;

(2) Contracts of insurance or guaranty;

(3) Federal financial assistance to a person who is the ultimate beneficiary under any program;

(4) Federal procurement contracts, with the exception of contracts to operate or provide services to Job Corps Centers; and

(5) Federally-operated Job Corps Centers. The operating Department is responsible for enforcing the nondiscrimination and equal opportunity laws to which such Centers are subject.

§ 34.2 Definitions.

As used in this part, the term:

Administrative Law Judge means a person appointed as provided in 5 U.S.C. 3105 and 5 CFR 930.203 and qualified under 5 U.S.C. 557 to preside at hearings held under the nondiscrimination and equal opportunity provisions of JTPA and this part.

Applicant means the person or persons seeking JTPA services who have filed a completed application and for whom a formal eligibility determination has been made. For State Employment Security Agency (SESA) programs, *applicant* means the person or persons who make(s) application to receive benefits or services from the State employment service agency or the State unemployment compensation agency. See also the definitions of *eligible applicant* and *participant* in this section.

Applicant for employment means the person or persons who make(s) application for employment with a recipient of Federal financial assistance under JTPA.

Application for assistance means the process by which required documentation is provided to the Governor, recipient, or Department prior to and as a condition of receiving Federal financial assistance under JTPA (including both new and continuing assistance).

Application for benefits means the process by which written information is provided by applicants or eligible applicants prior to and as a condition of receiving benefits or services from a recipient of financial assistance from the Department of Labor under JTPA.

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Assistant Secretary means the Assistant Secretary for Administration and Management, United States Department of Labor.

Auxiliary aids or services includes—

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, or other effective means of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, brailled materials, large print materials, or other effective means of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Beneficiary means the person or persons intended by Congress to receive benefits or services from a recipient of Federal financial assistance under JTPA.

Citizenship: See *Discrimination on the ground of citizenship.*

Department means the U.S. Department of Labor (DOL), including its agencies and organizational units.

Director means the Director, Directorate of Civil Rights (DCR), Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor, or a designee authorized to act for the Director.

Directorate means the Directorate of Civil Rights (DCR), Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase *physical or mental impairment* means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. The term *impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by the recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the recipient as having such an impairment.

(5) Consistent with amendments to the Rehabilitation Act of 1973 and to the JTPA, and with the ADA, this part uses the term *disability* in place of the term *handicap*. The two terms are intended to have identical meanings.

Discrimination on the ground of citizenship means a denial of participation in programs or activities financially assisted in whole or in part under JTPA to persons on the basis of their status as citizens or nationals of the United States, lawfully admitted permanent resident aliens, lawfully admitted refugees and parolees, or other individuals authorized by the Attorney General to work in the United States.

Eligible applicant means an applicant who has been determined eligible to participate in one or more titles under JTPA.

Entity means any corporation, partnership, joint venture, unincorporated association, or State or local government, and any agency, instrumentality or subdivision of such a government.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock, or other real or personal property or interest in such property.

Federal financial assistance under JTPA means any grant, cooperative agreement, loan, contract; any subgrant made with a recipient of a grant or subcontract made pursuant to a JTPA contract; or any other arrangement by which the Department provides or otherwise makes available assistance under JTPA in the form of:

(1) Funds, including funds made available for the acquisition, construction, renovation, restoration or repair of a building or facility or any portion thereof;

(2) Services of Federal personnel; or

(3) Real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration;

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government; or

(iii) Any other thing of value by way of grant, loan, contract, or cooperative agreement (other than a procurement contract or a contract of insurance or guaranty).

Governor means the chief elected official of any State or his or her designee.

Grant applicant means the entity which submits the required documentation to the Governor, recipient, or the Department, prior to and as a condition of receiving Federal financial assistance under JTPA.

Guideline means written informational material supplementing an agency's regulations and provided to grant applicants and recipients to provide program-specific interpretations of their responsibilities under the regulations.

Illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. *Illegal use of drugs* does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability, as defined in this section. The term *impairment* does not include homosexuality or bisexuality; therefore, the term *individual with a disability* does not include an individual on the basis of homosexuality or bisexuality.

(1) The term *individual with a disability* does not include an individual on the basis of:

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

(2) The term *individual with a disability* also does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use. This limitation should not be construed to exclude as an *individual with a disability* an individual who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use, except that it shall not be a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (2)(i) or (2)(ii) of this definition is no longer engaging in the illegal use of drugs.

(3) With regard to employment, the term *individual with a disability* does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

JTPA means the Job Training Partnership Act of 1982, as amended, Public Law 97–300, 96 Stat. 1322 (29 U.S.C. 1501 et seq.), including the Nontraditional Employment for Women Act of 1991, Public Law 102–235, 105 Stat. 1806 (29 U.S.C. 1501), and the Job Training Reform Amendments of 1992, Public Law 102–367, 106 Stat. 1021.

JTPA-funded program or activity means a program or activity, operated by a recipient and funded under JTPA, for the provision of services, financial aid, or other benefit to individuals (including but not limited to education or training, health, welfare, housing,

social service, rehabilitation or other services, whether provided through employees of the recipient or by others through contract or other arrangements with the recipient, and including work opportunities and cash, loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. It also includes services, financial aid, or other benefits provided in facilities constructed with the aid of Federal financial assistance under JTPA. It further includes services, financial aid, or other benefits provided with the aid of any non-JTPA funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance under JTPA.

Methods of Administration means the written document and supporting documentation developed pursuant to § 34.33.

National Programs means programs receiving Federal funds under JTPA directly from the Department. Such programs include, but are not limited to, programs funded under title IV of JTPA, such as the Migrant and Seasonal Workers Programs, Native Americans Programs, Job Corps, National Activities and such Veterans' Employment programs as are funded by the Department. *National programs* also includes programs funded under certain titles of the Nontraditional Employment for Women Act.

Noncompliance means a failure of a recipient to comply with any of the applicable requirements of the nondiscrimination and equal opportunity provisions of JTPA or this part.

Participant means an individual who has been determined to be eligible to participate in and who is receiving services (except post-termination and follow-up services) under a program authorized by JTPA. Participation shall be deemed to commence on the first day, following determination of eligibility, on which the participant began receiving subsidized employment, training, or other services provided under JTPA.

Parties to a hearing means the Department and the grant applicant(s) or recipient(s).

Prohibited ground means any basis upon which it is illegal to discriminate under the nondiscrimination and equal opportunity provisions of JTPA or this part, i.e., race, color, religion, sex, national origin, age, disability, political affiliation or belief, and, for beneficiaries only, citizenship or participation in JTPA.

Qualified individual with a disability means:

(1) With respect to employment, an individual with a disability who, with or without reasonable accommodation, is capable of performing the essential functions of the job in question;

(2) With respect to services, an individual with a disability who meets the essential eligibility requirements for the receipt of such services;

(3) With respect to employment and employment-related training programs, an individual with a disability who meets the eligibility requirements for participation in JTPA and who, with or without reasonable accommodation, is capable of performing the essential functions of the job or meets the qualifications of the training program, as applicable.

Recipient means any entity to which Federal financial assistance under any title of JTPA is extended, either directly or through the Governor or through another recipient (including any successor, assignee, or transferee of a recipient), but excluding the ultimate beneficiaries of the JTPA-funded program or activity and the Governor. *Recipient* includes, but is not limited to: Job Corps Centers and Center operators (excluding federally-operated Job Corps Centers), State Employment Security Agencies, State-level agencies that administer JTPA funds, SDA grant recipients, Substate grant recipients and service providers, as well as National Program recipients.

Respondent means the grant applicant or recipient against which a complaint has been filed pursuant to the nondiscrimination and equal opportunity provisions of JTPA or this part.

SDA grant recipient means the entity that receives JTPA funds for a service delivery area (SDA) directly from the Governor.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Service provider means the operator of any JTPA-funded program or activity that receives funds from or through an SDA grant recipient or a Substate grantee.

Small recipient means a recipient who serves fewer than 15 beneficiaries, and employs fewer than 15 employees at all times during a grant year.

Solicitor means the Solicitor of Labor, U.S. Department of Labor, or his or her designee.

State means the individual states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau.

State Employment Security Agency (SESA) means the State agency which, under the State Administrator, contains both the State Employment Service agency (State agency) and the State unemployment compensation agency.

State Programs means programs funded in whole or in part under JTPA wherein the Governor and/or State receives and disburses the grant to or through SDA grant recipients or Substate grantees. Such programs include but are not limited to those programs funded in whole or in part under titles II or III of JTPA. *State programs* also includes *State Employment Security Agencies.*

Substate grantee means that agency or organization selected to administer programs pursuant to section 312(b) of JTPA. The Substate grantee is the entity that receives title III funds for a substate area directly from the Governor.

Terminee means a *participant* terminating during the applicable program year.

§ 34.3 Discrimination prohibited.

No individual in the United States shall, on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA, be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any JTPA-funded program or activity.

§ 34.4 Specific discriminatory actions prohibited on the ground of race, color, religion, sex, national origin, age, political affiliation or belief, citizenship, or participation in JTPA.

(a) For the purposes of this section, prohibited ground means race, color, religion, sex, national origin, age, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA. A recipient shall not, directly or through contractual, licensing, or other arrangements, on a prohibited ground:

(1) Deny an individual any service, financial aid, or benefit provided under the JTPA-funded program or activity;

(2) Provide any service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the JTPA-funded program or activity;

(3) Subject an individual to segregation or separate treatment in any matter related to his or her receipt of any service, financial aid, or benefit under the JTPA-funded program or activity;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or benefit under the JTPA-funded program or activity;

(5) Treat an individual differently from others in determining whether he or she satisfies any admission, enrollment, eligibility, membership, or other requirement or condition for any service, financial aid, function or benefit provided under the JTPA-funded program or activity;

(6) Deny or limit an individual with respect to any opportunity to participate in the JTPA-funded program or activity, or afford him or her an opportunity to do so which is different from that afforded others under the JTPA-funded program or activity;

(7) Deny an individual the opportunity to participate as a member of a planning or advisory body which is an integral part of the JTPA-funded program or activity;

(8) Aid or perpetuate discrimination by providing significant assistance to an agency, organization, or person that discriminates on a prohibited ground in providing any service, financial aid, or benefit to applicants or participants in the JTPA-funded program or activity;

(9) Refuse to accommodate a person's religious practices or beliefs, unless to do so would result in undue hardship; or

(10) Otherwise limit on a prohibited ground an individual in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service, or training.

(b) In determining the types of services, financial aid or other benefits or facilities that will be provided under any JTPA-funded program or activity, or the class of individuals to whom or the situations in which such services, financial aid, or other benefits or facilities will be provided, a recipient shall not use, directly or through contractual, licensing, or other arrangements, standards, procedures or criteria that have the purpose or effect of subjecting individuals to discrimination on a prohibited ground or that have the purpose or effect of defeating or substantially impairing, on a prohibited ground, accomplishment of the objectives of the JTPA-funded program or activity. This paragraph applies to the administration of JTPA-funded programs or activities providing services, financial aid, benefits or facilities in any manner, including, but not limited to, recruitment, registration, counseling, testing, guidance, selection, placement, appointment, training, referral, promotion and retention.

(c) In determining the site or location of facilities, a grant applicant or recipient may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination on a prohibited ground, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program, or the nondiscrimination and equal opportunity provisions of JTPA or this part.

(d) The exclusion of an individual from programs or activities limited by Federal statute or Executive Order to a certain class or classes of individuals of which the individual in question is not a member is not prohibited by this part.

§ 34.5 Specific discriminatory actions prohibited on the ground of disability.

(a) In providing any aid, benefit, service or training under a JTPA-funded program or activity, a recipient shall not, directly or through contractual, licensing, or other arrangements, on the ground of disability:

(1) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, service or training;

(2) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, service or training that is not equal to that afforded others;

(3) Provide a qualified individual with a disability with an aid, benefit, service or training that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(4) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, services or training that are as effective as those provided to others;

(5) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, service or training to participants;

(6) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(7) Otherwise limit a qualified individual with a disability in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service or training.

(b) A recipient may not deny a qualified individual with a disability the opportunity to participate in JTPA-funded programs or activities despite the existence of permissibly separate or different programs or activities.

(c) A recipient shall administer JTPA-funded programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(d) A recipient may not, directly or through contractual or other arrangements, utilize criteria or administrative methods:

(1) That have the effect of subjecting qualified individuals with disabilities to discrimination on the ground of disability;

(2) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the JTPA-funded program or activity with respect to individuals with disabilities; or

(3) That perpetuate the discrimination of another entity if both entities are subject to common administrative control or are agencies of the same state.

(e) In determining the site or location of facilities, a grant applicant or recipient may not make selections with the purpose or effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination under any JTPA-funded program or activity, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the JTPA-funded program or activity or this part with respect to individuals with disabilities.

(f) As used in this section, references to the aid, benefit, service or training provided under a JTPA-funded program or activity include any aid, benefit, service or training provided in or through a facility that has been constructed, expanded, altered, leased, rented, or otherwise acquired, in whole or in part, with Federal financial assistance under JTPA.

(g) The exclusion of an individual without a disability from the benefits of a program limited by Federal statute or Executive Order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive Order to a different class of individuals with disabilities is not prohibited by this part.

(h) This part does not require a recipient to provide to individuals with disabilities: personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

§ 34.6 Communications with individuals with disabilities.

(a) Recipients shall take appropriate steps to ensure that communications with beneficiaries, applicants, eligible applicants, participants, applicants for employment, employees and members of the public who are individuals with disabilities, are as effective as communications with others.

(b) A recipient shall furnish appropriate auxiliary aids or services where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the JTPA-funded program or activity. In determining what type of auxiliary aid or service is necessary, such recipient shall give primary consideration to the requests of the individual with a disability.

(c) Where a recipient communicates with beneficiaries, applicants, eligible applicants, participants, applicants for employment and employees by telephone, telecommunications devices for individuals with hearing impairments (TDDs), or equally effective communications systems shall be used.

(d) A recipient shall ensure that interested persons, including persons with visual or hearing impairments, can obtain information as to the existence and location of accessible services, activities, and facilities.

(e) A recipient shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(f) This section does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

(1) In those circumstances where a recipient believes that the proposed action would fundamentally alter the JTPA-funded program, activity, or service, or would result in undue financial and administrative burdens, such recipient has the burden of proving that compliance with this section would result in such alteration or burdens.

(2) The decision that compliance would result in such alteration or burdens must be made by the recipient after considering all resources available for use in the funding and operation of the JTPA-funded program, activity, or service and must be accompanied by a written statement of the reasons for reaching that conclusion.

(3) If an action required to comply with this section would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient.

§ 34.7 Employment practices.

(a) As used in this part, the term "employment practices" includes, but is not limited to, recruitment or recruitment advertising, selection, placement, layoff or termination, upgrading, demotion or transfer, training, participation in upward mobility programs, rates of pay or other forms of compensation, and use of facilities and other terms and conditions of employment.

(b) Discrimination on the ground of race, color, religion, sex, national origin, age, disability, or political affiliation or belief is prohibited in employment practices in the administration of, or in connection with, any JTPA-funded program or activity.

(c) *Employee selection procedures.* In implementing this section, a recipient shall comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3.

(d) *Standards for employment-related investigations and reviews.* In any investigation or compliance review, the Director shall consider EEOC regulations, guidelines and appropriate case law in determining whether a recipient has engaged in an unlawful employment practice.

(e) As provided in § 34.1(c)(2) of this part, this rule does not affect in any way the obligation of recipients to comply with subparts B and C and appendix A of 29 CFR part 32, implementing the requirements of section 504 pertaining to employment practices and employment-related training, program accessibility, and accommodations. Therefore, this section should not be understood to constitute an exhaustive list of employment-related nondiscrimination and equal opportunity obligations on the ground of disability.

(f) Recipients that are also employers covered by titles I and II of the ADA should be aware of obligations imposed pursuant to those titles. See 29 CFR part 1630 and 28 CFR part 35.

(g) This rule does not preempt consistent State and local requirements.

§ 34.8 Intimidation and retaliation prohibited.

A recipient shall not discharge, intimidate, retaliate, threaten, coerce or discriminate against any person because such person has: filed a complaint; opposed a prohibited practice; furnished information; assisted or participated in any manner in an investigation, review, hearing or any other activity related to administration of, or exercise of authority under, or privilege secured by, the nondiscrimination and equal opportunity provisions of JTPA or this part; or otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of JTPA or this part. The sanctions and penalties contained in section 167 of JTPA or this part may be imposed against any recipient that engages in any such proscribed activity or fails to take appropriate steps to prevent such activity.

§ 34.9 Designation of responsible office; rulings and interpretations.

(a) The Directorate of Civil Rights (DCR), in the Office of the Assistant Secretary for Administration and Management, is responsible for administering and enforcing the nondiscrimination and equal opportunity provisions of JTPA and this part and for developing and issuing policies, standards, guidelines and procedures for effecting compliance.

(b) The Director shall make any rulings under or interpretations of the nondiscrimination and equal opportunity provisions of JTPA or this part.

§ 34.10 [Reserved]

§ 34.11 Effect of other obligations or limitations.

(a) *Effect of State or local law or other requirements.* The obligation to comply with the nondiscrimination and equal opportunity provisions of JTPA or this part shall not be obviated or alleviated by any State or local law or other requirement that, on a prohibited ground, prohibits or limits an individual's eligibility to receive services, compensation or benefits, to participate in any JTPA-funded program or activity, or to be employed by any

recipient, or to practice any occupation or profession.

(b) *Effect of private organization rules.* The obligation to comply with the nondiscrimination and equal opportunity provisions of JTPA and this part shall not be obviated or alleviated by any rule or regulation of any private organization, club, league or association that, on a prohibited ground, prohibits or limits an individual's eligibility to participate in any JTPA-funded program or activity to which this part applies.

(c) *Effect of the availability of employment opportunities.* The availability of future employment opportunities, or lack thereof, in any occupation or profession for qualified individuals with disabilities or persons of a certain race, color, religion, sex, national origin, age, political affiliation or belief, or citizenship shall not be considered in recruiting, selecting or placing individuals in programs or activities.

§ 34.12 Delegation and coordination.

(a) The Secretary may from time to time assign to officials of other departments or agencies of the Government (with the consent of such department or agency) responsibilities in connection with the effectuation of the nondiscrimination and equal opportunity provisions of JTPA and this part (other than responsibility for final decisions pursuant to § 34.42), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the Government in the application of the nondiscrimination and equal opportunity provisions of JTPA or this part to similar programs and similar situations.

(b) Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the Director.

(c) Whenever a compliance review or complaint investigation under this part reveals possible violation of Executive Order 11246, as amended, section 503 of the Rehabilitation Act of 1973, as amended, the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), the Equal Pay Act of 1963, as amended, title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Americans With Disabilities Act, or any other Federal civil rights law, that is not also a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part, the Director shall attempt to notify the appropriate agency and provide it with all relevant documents and information.

Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

§ 34.20 Assurance required; duration of obligation; covenants.

(a) *Assurance.* (1) Each application for Federal financial assistance under JTPA, as defined in § 34.2, shall include an assurance, in the following form, with respect to the operation of the JTPA-funded program or activity and all agreements or arrangements to carry out the JTPA-funded program or activity:

As a condition to the award of financial assistance under JTPA from the Department of Labor, the grant applicant assures, with respect to operation of the JTPA-funded program or activity and all agreements or arrangements to carry out the JTPA-funded program or activity, that it will comply fully with the nondiscrimination and equal opportunity provisions of the Job Training Partnership Act of 1982, as amended (JTPA), including the Nontraditional Employment for Women Act of 1991; title VI of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; the Age Discrimination Act of 1975, as amended; title IX of the Education Amendments of 1972, as amended; and with all applicable requirements imposed by or pursuant to regulations implementing those laws, including but not limited to 29 CFR part 34. The United States has the right to seek judicial enforcement of this assurance.

(2) The assurance shall be deemed incorporated by operation of law in the grant, cooperative agreement, contract or other arrangement whereby Federal financial assistance under JTPA is made available, whether or not it is physically incorporated in such document and whether or not there is a written agreement between the Department and the recipient, between the Department and the Governor, between the Governor and the recipient, or between recipients. The assurance may also be incorporated by reference in such grants, cooperative agreements, contracts or other arrangements.

(b) *Continuing State programs.* Each application by a State or a State agency to carry out a continuing JTPA-funded program or activity shall, as a condition to its approval and the extension of any Federal financial assistance under JTPA pursuant to the application, provide a statement that the JTPA-funded program or activity is (or, in the case of a new JTPA-funded program or activity, will be) conducted in compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part. The State shall certify that it has developed and maintains a Methods of Administration pursuant to § 34.33.

(c) *Duration and scope of obligation.* (1) Where the Federal financial assistance under JTPA is to provide or is in the form of personal property or real property or interest therein or structures thereon, the assurance shall obligate the recipient, or (in the case of a subsequent transfer) the transferee, for the period during which the property is used for a purpose for which Federal financial assistance under JTPA is extended, or for as long as the recipient retains ownership or possession of the property, whichever is longer.

(2) In all other cases, the assurance shall obligate the recipient for the period during which Federal financial assistance under JTPA is extended.

(d) *Covenants.* (1) Where Federal financial assistance under JTPA is provided in the form of a transfer of real property, structures, or improvements thereon, or interests therein, the instrument effecting or recording the transfer shall contain a covenant assuring nondiscrimination and equal opportunity for the period during which the real property is used for a purpose for which the Federal financial assistance under JTPA is extended.

(2) Where no Federal transfer of real property or interest therein from the Federal Government is involved, but real property or an interest therein is acquired or improved under a program of Federal financial assistance under JTPA, the recipient shall include such covenant described in paragraph (d)(1) of this section in the instrument effecting or recording any subsequent transfer of such property.

(3) When the property is obtained from the Federal Government, such covenant described in paragraph (d)(1) of this section may also include a condition coupled with a right of reverter to the Department in the event of a breach of the covenant.

§ 34.21 Equitable services.

Recipients shall make efforts to provide equitable services among substantial segments of the population eligible for participation in JTPA. Such efforts shall include but not be limited to outreach efforts to broaden the composition of the pool of those considered for participation, to include members of both sexes, the various race/ethnicity and age groups, and individuals with disabilities.

§ 34.22 Designation of Equal Opportunity Officer.

(a) A recipient, other than a small recipient or service provider as defined

in § 34.2, shall designate an Equal Opportunity Officer to coordinate its responsibilities under this part. Such responsibilities include, but are not limited to, serving as the recipient's liaison with the Directorate and overseeing the development and implementation of the Methods of Administration pursuant to § 34.33. The Equal Opportunity Officer shall report on equal opportunity matters directly to the State JTPA Director, Governor's JTPA Liaison, Job Corps Center Director, SESA Administrator, or chief executive officer of the SDA or substate grant recipient, as applicable. The Director may require the Equal Opportunity Officer and his or her staff to undergo training, the expenses of which shall be the responsibility of the recipient. The recipient shall make public the name, title of position, address and telephone number of the Equal Opportunity Officer.

(b) Recipients shall assign sufficient staff and resources to the Equal Opportunity Officer to ensure compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part.

(c) Small recipients shall designate an individual responsible for the adoption and publication of complaint procedures and the processing of complaints pursuant to § 34.42.

(d) Service providers as defined by § 34.2 shall not be required to designate an Equal Opportunity Officer. The responsibility for ensuring service provider compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part shall rest with the Governor, SDA grant recipient or Substate grantee, as provided in the State's Methods of Administration.

§ 34.23 Dissemination of policy.

(a) *Initial and Continuing Notice.* (1) A recipient shall provide initial and continuing notice that it does not discriminate on any prohibited ground, to: Applicants, eligible applicants, participants, applicants for employment, employees, and members of the public, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient.

(2) The notice requirement imposed pursuant to paragraph (a)(1) of this section requires, at a minimum, that the notice specified in paragraph (a)(5) of this section be: posted prominently, in reasonable numbers and places; disseminated in internal memoranda and other written communications; included in handbooks or manuals; and made available to each participant and made a part of the participant's file. The required notice to the public applicable to generally-distributed publications is contained in paragraph (b) of this section.

(3) The recipient shall provide that the initial and continuing notice required by paragraph (a) of this section be provided in appropriate formats to individuals with visual impairments. Where notice has been given in an alternate format to a participant with a visual impairment, a record that such notice has been given shall be made a part of the participant's file.

(4) The notice required by paragraph (a) of this section must be provided within 90 days of the effective date of this part or of the date this part first applies to the recipient, whichever comes later.

(5) The notice required by paragraph (a) of this section shall contain the following prescribed language:

Equal Opportunity Is the Law

This recipient is prohibited from discriminating on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in programs funded under the Job Training Partnership Act, as amended (JTPA), in admission or access to, opportunity or treatment in, or employment in the administration of or in connection with, any JTPA-funded program or activity. If you think that you have been subjected to discrimination under a JTPA-funded program or activity, you may file a complaint within 180 days from the date of the alleged violation with the recipient's Equal Opportunity Officer (or the person designated for this purpose), or you may file a complaint directly with the Director, Directorate of Civil Rights (DCR), U.S. Department of Labor, 200 Constitution Avenue NW., room N–4123, Washington, DC 20210. If you elect to file your complaint with the recipient, you must wait until the recipient issues a decision or until 60 days have passed, whichever is sooner, before filing with DCR (see address above). If the recipient has not provided you with a written decision within 60 days of the filing of the complaint, you need not wait for a decision to be issued, but may file a complaint with DCR within 30 days of the expiration of the 60-day period. If you are dissatisfied with the recipient's resolution of your complaint, you may file a complaint with DCR. Such complaint must be filed within 30 days of the date you received notice of the recipient's proposed resolution.

(6) The Governor, the SDA grant recipient or the Substate grantee, as determined by the Governor in that State's Methods of Administration, shall be responsible for meeting the notice requirement of paragraph (a) of this section with respect to its service providers.

(7) Recipient's responsibility to provide notice. Whenever a recipient passes on Federal financial assistance under JTPA to another recipient, the recipient passing on such assistance shall provide the recipient receiving the assistance with the notice prescribed in paragraph (a)(5) of this section.

(b) *Publications.* (1) In recruitment brochures and other materials which are ordinarily distributed to the public to describe programs funded under JTPA or the requirements for participation by recipients and participants, recipients shall indicate that the JTPA-funded program or activity in question is an "equal opportunity employer/program" and that "auxiliary aids and services are available upon request to individuals with disabilities." Where such materials indicate that the recipient may be reached by telephone, the materials shall state the telephone number of the TDD or relay service used by the recipient, as required by § 34.6.

(2) Recipients required by law or regulation to publish or broadcast program information in the news media shall ensure that such publications and broadcasts state that the JTPA-funded program or activity in question is an equal opportunity employer/program (or otherwise indicate that discrimination in the JTPA-funded program or activity is prohibited by Federal law), and indicate that auxiliary aids and services are available upon request to individuals with disabilities.

(3) A recipient shall not use or distribute a publication of the type described in paragraph (b) of this section which suggests, by text or illustration, that such recipient treats beneficiaries, applicants, participants, employees or applicants for employment differently on any prohibited ground specified in § 34.1(a), except as such treatment is otherwise permitted under Federal law or this part.

(c) *Services or information in a language other than English.* A significant number or proportion of the population eligible to be served or likely to be directly affected by a JTPA-funded program or activity may need service or information in a language other than English in order that they be effectively informed of or able to participate in the JTPA-funded program or activity. In such circumstances, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide to such persons, in appropriate languages, the information needed; the initial and continuing notice required pursuant to paragraph (a) of this section; and such written materials as are

distributed pursuant to paragraph (b) of this section.

(d) *Orientation.* The recipient shall, during each presentation to orient new participants and/or new employees to its JTPA-funded program or activity, include a discussion of participants' and/or employees' rights under the nondiscrimination and equal opportunity provisions of JTPA and this part, including the right to file a complaint of discrimination with the recipient or the Director.

(e) As provided in § 34.6, the recipient shall take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others.

§ 34.24 Data and information collection; confidentiality.

(a) *Data and information collection.* The Director shall not require submission of data that can be obtained from existing reporting requirements or sources, including those of other agencies, if the source is known and available to the Director.

(1) Each recipient shall collect such data and maintain such records, in accordance with procedures prescribed by the Director, as the Director finds necessary to determine whether the recipient has complied or is complying with the nondiscrimination and equal opportunity provisions of JTPA or this part.

(2) Such records shall include, but are not limited to, records on applicants, eligible applicants, participants, terminees, employees and applicants for employment. Each recipient shall record the race/ethnicity, sex, age, and where known, disability status, of every applicant, eligible applicant, participant, terminee, applicant for employment and employee. Such information shall be stored in such a manner as to ensure confidentiality and shall be used only for the purposes of recordkeeping and reporting; determining eligibility, where appropriate, for JTPA-funded programs or activities; determining the extent to which the recipient is operating its JTPA-funded program or activity in a nondiscriminatory manner; or other use authorized by the nondiscrimination and equal opportunity provisions of JTPA or this part.

(3) In addition to the information which shall be collected, maintained, and upon request, submitted to the Directorate pursuant to paragraphs (a)(1) and (a)(2) of this section:

(i) Each grant applicant and recipient shall promptly notify the Director of any administrative enforcement actions or lawsuits filed against it alleging discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in JTPA;

(ii) Each grant applicant (as part of its application) and recipient (as part of a compliance review conducted pursuant to § 34.40 (b) or (c), or monitoring activity carried out pursuant to § 34.34) shall provide: the name of any other Federal agency that conducted a civil rights compliance review or complaint investigation during the two preceding years in which the grant applicant or recipient was found to be in noncompliance; and shall identify the parties to, the forum of, and case numbers pertaining to, any administrative enforcement actions or lawsuits filed against it during the two years prior to its application (or, with respect to recipients, its renewal application) which allege discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, citizenship or participation in JTPA;

(iii) Each recipient shall maintain a log of complaints filed with it that allege discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, citizenship or participation in JTPA. The log shall include: the name and address of the complainant; the ground of the complaint, i.e., race, color, religion, sex, national origin, age, disability, political affiliation or belief, citizenship or participation in JTPA; a description of the complaint; the date the complaint was filed; the disposition and date of disposition of the complaint; and other pertinent information.

(4) At the discretion of the Director, grant applicants and recipients may be required to provide such information and data as are necessary to investigate complaints and conduct compliance reviews on grounds prohibited under the nondiscrimination and equal opportunity provisions of JTPA and this part, other than race/ethnicity, sex, age, and disability.

(5) At the discretion of the Director, recipients may be required to provide such particularized information and/or to submit such periodic reports as the Director deems necessary to determine compliance with the nondiscrimination and equal opportunity provisions of JTPA or this part.

(6) At the discretion of the Director, grant applicants may be required to submit such particularized information as is necessary to determine whether or not the grant applicant, if funded, would be able to comply with the nondiscrimination and equal opportunity provisions of JTPA or this part.

(7) Service Providers. A service provider's responsibility for collecting and maintaining the information required pursuant to this section may be assumed by the Governor, SDA grant recipient or Substate grantee, as provided in the State's Methods of Administration.

(b) *Access to sources of information.* (1) Each grant applicant and recipient shall permit access by the Director during normal business hours to its premises and to its employees and participants, to the extent that such individuals are on the premises during the course of the investigation, for the purpose of conducting complaint investigations, compliance reviews, monitoring activities associated with a State's development and implementation of a Methods of Administration, and inspecting and copying such books, records, accounts and other materials as may be pertinent to ascertain compliance with and ensure enforcement of the nondiscrimination and equal opportunity provisions of JTPA or this part.

(2) Asserted considerations of privacy or confidentiality shall not be a basis for withholding information from the Directorate and shall not bar the Directorate from evaluating or seeking to enforce compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part. Information obtained pursuant to the requirements of this part shall be used only in connection with compliance and enforcement activities pertinent to the nondiscrimination and equal opportunity provisions of JTPA and this part. Whenever any information required of a grant applicant or recipient is in the exclusive possession of another agency or institution which, or person who, fails or refuses to furnish such information, the grant applicant or recipient shall provide certification to the Directorate of such refusal and the efforts it has made to obtain the information.

(c) *Record retention requirements.* (1) Each recipient shall maintain for a period of not less than three years from the close of the applicable program year, applicant, eligible applicant, participant, terminee, employee and applicant for employment records; and such other records as are required under this part or by the Director. (2) Records regarding complaints and actions taken thereunder shall be maintained for a period of not less than three years from the date of resolution of the complaint.

(d) *Confidentiality.* The identity of any person who furnishes information

relating to, or assisting in, an investigation or a compliance review shall be kept confidential to the extent possible, consistent with a fair determination of the issues. A person whose identity it is necessary to disclose shall be protected from retaliation (see § 34.8).

(e) Where designation of persons by race or ethnicity is required, the guidelines of the Office of Management and Budget shall be used.

Subpart C—Governor's Responsibilities to Implement the Nondiscrimination and Equal Opportunity Requirements of JTPA

§ 34.30 Application.

This subpart applies to State Programs as defined in § 34.2. However, the provisions of § 34.32 (b) and (c) do not apply to State Employment Security Agencies (SESAs), because the Governor's liability for any noncompliance on the part of a SESA cannot be waived.

§ 34.31 Recordkeeping.

The Governor shall ensure that recipients collect and maintain records in a manner consistent with the provisions of § 34.24 and any procedures prescribed by the Director pursuant to § 34.24(a)(1). The Governor shall further ensure that recipients are able to provide data and reports in the manner prescribed by the Director.

§ 34.32 Oversight and liability.

(a) The Governor shall be responsible for oversight of all JTPA-funded State programs. This responsibility includes ensuring compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part, and negotiating with the recipient to secure voluntary compliance when noncompliance is found under § 34.45.

(b) The Governor and the recipient shall be jointly and severally liable for all violations of the nondiscrimination and equal opportunity provisions of JTPA and this part by the recipient, unless the Governor has:

(1) Established and adhered to a Methods of Administration, pursuant to § 34.33, designed to give reasonable guarantee of the recipient's compliance with such provisions;

(2) Entered into a written contract with the recipient which clearly establishes the recipient's obligations regarding nondiscrimination and equal opportunity;

(3) Acted with due diligence to monitor the recipient's compliance with these provisions; and

(4) Taken prompt and appropriate corrective action to effect compliance.

(c) If the Director determines that the Governor has demonstrated substantial compliance with the requirements of paragraph (b) of this section, he or she may recommend to the Secretary that the imposition of sanctions against the Governor be waived and that sanctions be imposed only against the noncomplying recipient.

§ 34.33 Methods of Administration.

(a)(1) Each Governor shall establish and adhere to a Methods of Administration for State programs as defined in § 34.2. In those States in which one agency contains both SESA and JTPA programs, the Governor may develop a combined Methods of Administration.

(2) Each Methods of Administration shall be designed to give reasonable guarantee that all recipients will comply and are complying with the nondiscrimination and equal opportunity provisions of JTPA and this part.

(b) The Methods of Administration shall be:

(1) In writing;

(2) Updated periodically as required by the Director; and

(3) Signed by the Governor.

(c) The Methods of Administration shall, at a minimum:

(1) Describe how the requirements of §§ 34.20, 34.21, 34.22, 34.23, 34.24, 34.31, and 34.42 have been satisfied; and

(2) Include the following additional elements:

(i) A system for periodically monitoring the compliance of recipients with this part, including a determination as to whether the recipient is conducting its JTPA-funded program or activity in a nondiscriminatory way;

(ii) A system for reviewing the nondiscrimination and equal opportunity provisions of job training plans, contracts, assurances, and other similar agreements;

(iii) Procedures for ensuring that recipients provide accessibility to individuals with disabilities;

(iv) A system of policy communication and training to ensure that members of the recipients' staffs who have been assigned responsibilities pursuant to the nondiscrimination and equal opportunity provisions of JTPA or this part are aware of and can effectively carry out these responsibilities;

(v) Procedures for obtaining prompt corrective action or, as necessary, applying sanctions when noncompliance is found; and

(vi) Supporting documentation to show that the commitments made in the Methods of Administration have been and/or are being carried out. Supporting documentation includes, but is not limited to: policy and procedural issuances concerning required elements of the Methods of Administration; copies of monitoring instruments and instructions; evidence of the extent to which nondiscrimination and equal opportunity policies have been developed and communicated pursuant to this part; information reflecting the extent to which Equal Opportunity training, including training called for by § 34.22, is planned and/or has been carried out; as applicable, reports of monitoring reviews and reports of follow-up actions taken thereunder where violations have been found, including, where appropriate, sanctions; and copies of any notification made pursuant to § 34.23.

(d) The Governor shall, within 180 days of the effective date of this part:

(1) Develop and implement Methods of Administration consistent with the requirements of this part, and

(2) Submit a copy of the Methods of Administration to the Director.

§ 34.34 Monitoring.

(a) The Director may periodically review the adequacy of the Methods of Administration established by a Governor, as well as the adequacy of the Governor's performance under that Methods of Administration, to determine compliance with the requirements of § 34.33. The Director may review the Methods of Administration during a compliance review under § 34.40, or at another time.

(b) Nothing in this subpart shall limit or preclude the Director from monitoring directly any JTPA recipient or from investigating any matter necessary to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of JTPA or this part.

(c) The procedures contained in subpart D of this part shall apply to reviews or investigations undertaken pursuant to paragraphs (a) and (b) of this section.

Subpart D—Compliance Procedures

§ 34.40 Compliance reviews.

(a) The Director may from time to time conduct pre- and post-approval compliance reviews of grant applicants for and recipients of Federal financial assistance under JTPA to determine compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part. Techniques used in such reviews may include desk reviews, on-site reviews, and off-site analyses.

(b) *Pre-approval reviews.* (1) As appropriate and necessary to ensure compliance with the nondiscrimination and equal opportunity provisions of JTPA or this part, the Director may review any application, or class of applications, for Federal financial assistance under JTPA prior to and as a condition of their approval. The basis for such review shall be the assurance specified in § 34.20, information and reports submitted by the grant applicant pursuant to this part or guidelines published by the Director, and any relevant records on file with the Department.

(2) Where the Director determines that the grant applicant for Federal financial assistance under JTPA, if funded, would not comply with the nondiscrimination and equal opportunity requirements of JTPA or this part, the Director shall issue a Letter of Findings. Such Letter of Findings shall advise the grant applicant, in writing, of:

(i) The preliminary findings of the review;

(ii) The proposed remedial or corrective action pursuant to § 34.44 and the time within which the remedial or corrective action should be completed;

(iii) Whether it will be necessary for the grant applicant to enter into a written Conciliation Agreement as described in § 34.45; and

(iv) The opportunity to engage in voluntary compliance negotiations.

(3) If a grant applicant has agreed to certain remedial or corrective actions in order to receive Federal financial assistance under JTPA, the Department shall ensure that the remedial or corrective actions have been taken or that a Conciliation Agreement has been entered into, prior to approving the award of further assistance under JTPA. If a grant applicant refuses or fails to take remedial or corrective actions or to enter into a Conciliation Agreement, as applicable, the Director shall follow the procedures outlined in § 34.46.

(4) The Director shall notify, in a timely manner, the departmental granting agency of the findings of the pre-approval compliance review.

(c) *Post-approval reviews.* (1) The Director may initiate a post-approval review of any recipient to determine compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part. The initiation of a review may be based on, but need not be limited to, the following: The results of routine program monitoring, the nature of or incidence of complaints, the date of the last review, and Congressional or community concerns.

(2) Such review shall be initiated by a Notification Letter, advising the recipient of:

(i) The practices to be reviewed;

(ii) The programs to be reviewed;

(iii) The data to be submitted by the recipient within 30 days of the receipt of the Notification Letter; and

(iv) The opportunity, at any time prior to receipt of the Final Determination described in § 34.46, to make a documentary or other submission which explains, validates or otherwise addresses the practices under review.

(3) Except as provided in § 34.41(e), within 210 days of issuing a Notification Letter initiating a review, the Director shall:

(i) Issue a Letter of Findings, which shall advise the recipient, in writing, of:

(A) The preliminary findings of the review;

(B) Where appropriate, the proposed remedial or corrective action to be taken, and the time by which such action should be completed, as provided in § 34.44;

(C) Whether it will be necessary for the recipient to enter into a written assurance and/or Conciliation Agreement, as provided in § 34.45; and

(D) The opportunity to engage in voluntary compliance negotiations.

(ii) Where no violation is found, the recipient shall be so informed in writing.

(4) The time limit for submitting data to the Director pursuant to paragraph (c)(2)(iii) of this section may be modified by the Director.

§ 34.41 Notice to Show Cause.

(a) The Director may issue a Notice to Show Cause to a recipient failing to comply with the requirements of this part, where such failure results in the inability of the Director to make a finding. Such a failure includes, but is not limited to, the failure or refusal to:

(1) Submit requested data within 30 days of the receipt of the Notification Letter;

(2) Submit documentation requested during a compliance review; or

(3) Provide the Directorate access to a recipient's premises or records during a compliance review.

(b) The Notice to Show Cause shall contain:

(1) A description of the violation and a citation to the pertinent nondiscrimination or equal opportunity provision(s) of JTPA and this part;

(2) The corrective action necessary to achieve compliance or, as may be appropriate, the concepts and principles of acceptable corrective or remedial action and the results anticipated; and

(3) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence.

(c) Such Notice to Show Cause shall give the recipient 30 days to show cause why enforcement proceedings under the nondiscrimination and equal opportunity provisions of JTPA or this part should not be instituted. A recipient may make such a showing by, among other means:

(1) Correcting the violation(s) that brought about the Notice to Show Cause and entering into a written assurance and/or entering into a Conciliation Agreement, as appropriate, pursuant to § 34.45(d);

(2) Demonstrating that the Directorate does not have jurisdiction; or

(3) Demonstrating that the violation alleged by the Directorate did not occur.

(d) If the recipient fails to show cause why enforcement proceedings should not be initiated, the Director shall follow the procedures outlined in § 34.46.

(e) The 210 day requirement provided for in § 34.40(c)(3) shall be tolled during the pendency of a Notice to Show Cause.

§ 34.42 Adoption of discrimination complaint processing procedures.

(a) Each recipient shall adopt and publish procedures for processing complaints that allege a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part. The procedures shall provide for the prompt and equitable resolution of such complaints. In the case of service providers, the procedures required by this paragraph shall be adopted and published on behalf of the service provider by the Governor, the SDA grant recipient or the Substate grantee, as provided in the State's Methods of Administration.

(b) The recipient's Equal Opportunity Officer, or in the case of a small recipient, the person designated pursuant to § 34.22(c), shall be responsible for the adoption and publication of procedures pursuant to paragraph (a) of this section, and for ensuring that such procedures are followed.

(c) A recipient who processes a complaint alleging a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part shall provide the complainant with written notification of the resolution within 60 days of the filing of the complaint. Such notification shall include a statement of complainant's right to file a complaint with the Director.

§ 34.43 Complaints and investigations.

(a) *Who may file.* Any person who believes that he or she or any specific class of individuals has been or is being subjected to discrimination prohibited by the nondiscrimination and equal opportunity provisions of JTPA or this part may file a written complaint by him or herself or by a representative.

(b) *Where to file.* The complaint may be filed either with the recipient or with the Director.

(c) *Time for filing.* A complaint filed pursuant to this part must be filed within 180 days of the alleged discrimination. The Director, for good cause shown, may extend the filing time. This time period for filing is for the administrative convenience of the Directorate and does not create a defense for the respondent.

(d) *Contents of complaints.* Each complaint shall be filed in writing and shall:

(1) Be signed by the complainant or his or her authorized representative;

(2) Contain the complainant's name and address (or specify another means of contacting him or her);

(3) Identify the respondent; and

(4) Describe the complainant's allegations in sufficient detail to allow the Director or the recipient, as applicable, to determine whether:

(i) The Directorate or the recipient, as applicable, has jurisdiction over the complaint;

(ii) The complaint was timely filed; and

(iii) The complaint has apparent merit, i.e., whether the allegations, if true, would violate any of the nondiscrimination and equal opportunity provisions of JTPA or this part. The information required by this paragraph may be provided by completing and submitting the Directorate's Complaint Information and Privacy Act Consent Forms.

(e) *Right to Representation.* Each complainant and respondent has the right to be represented by an attorney or other individual of his or her own choice.

(f) *Election of recipient-level complaint processing.* Any person who elects to file his or her complaint with the recipient shall allow the recipient 60 days to process the complaint.

(1) If, during the 60-day period, the recipient offers the complainant a resolution of the complaint but the resolution offered is not satisfactory to the complainant, the complainant or his or her representative may file a complaint with the Director within 30 days after the recipient notifies the complainant of its proposed resolution.

(2) Within 60 days, the recipient shall offer a resolution of the complaint to the complainant, and shall notify the complainant of his or her right to file a complaint with the Director, and inform the complainant that this right must be exercised within 30 days.

(3) If, by the end of 60 days, the recipient has not completed its processing of the complaint or has failed to notify the complainant of the resolution, the complainant or his or her representative may, within 30 days of the expiration of the 60-day period, file a complaint with the Director.

(4) The Director may extend the 30-day time limit if the complainant is not notified as provided in paragraph (f)(2) of this section, or for other good cause shown.

(5) Notification of no jurisdiction. The recipient shall notify the complainant in writing immediately upon determining that it does not have jurisdiction over a complaint that alleges a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part. The notification shall also include the basis for such determination, as well as a statement of the complainant's right to file a written complaint with the Director within 30 days of receipt of the notification.

(g) *Complaints filed with the Director.*

(1) Notification of acceptance of complaint. The Director shall determine whether the Directorate will accept a complaint filed pursuant to this section. Where the Directorate accepts a complaint for investigation, he or she shall:

(i) Acknowledge acceptance of the complaint for investigation to the complainant and the respondent, and

(ii) Advise the complainant and respondent of the issues over which the Directorate has accepted jurisdiction.

(2) Any complainant, respondent, or the authorized representative of any complainant or respondent, may contact the Directorate for information regarding the complaint filed pursuant to this section.

(3) Where a complaint contains insufficient information, the Director shall seek the needed information from the complainant. If the complainant is unavailable after reasonable means have been used to locate him or her, or the information is not furnished within 15 days of the receipt of such request, the complaint file may be closed without prejudice upon notice sent to the complainant's last known address.

(4) The Director may issue a subpoena, as authorized by Section 163(c) of JTPA, directing the person named therein to appear and give testimony and/or produce documentary evidence, before a designated representative, relating to the complaint being investigated. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated time and place.

(5) Where the Directorate lacks jurisdiction over a complaint, he or she shall:

(i) So advise the complainant, indicating why the complaint falls outside the coverage of the nondiscrimination and equal opportunity provisions of JTPA or this part; and

(ii) Where possible, refer the complaint to an appropriate Federal, State or local authority.

(6) Where a complaint lacks apparent merit or has not been timely filed, it need not be investigated. Where a complaint will not be investigated, the Director shall so inform the complainant and indicate the basis for that determination.

(7) Where a complaint alleging discrimination based on age falls within the jurisdiction of the Age Discrimination Act of 1975, as amended, the Director shall refer the complaint in accordance with the provisions of 45 CFR 90.43(c)(3), and shall so advise the complainant and the respondent.

(8) Where a complaint solely alleges a charge of individual employment discrimination covered by the nondiscrimination and equal opportunity provisions of JTPA or this part and by title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e to 2000e–17), the Equal Pay Act of 1963, as amended (29 U.S.C. 206(d)), or the Age Discrimination in Employment Act of 1976, as amended (29 U.S.C. 621, et seq.), the Director shall refer such "joint complaint" to the Equal Employment Opportunity Commission for investigation and conciliation under procedures for handling joint complaints at 29 CFR part 1691, and shall advise the complainant and the respondent of the referral.

(9) Determinations. The Director shall determine at the conclusion of the investigation of a complaint whether there is reasonable cause to believe that a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part has occurred.

(i) Upon making such a cause finding, the Director shall issue an Initial Determination. The Initial Determination shall notify the complainant and the respondent, in writing, of:

(A) The specific findings of the investigation;

(B) The proposed corrective or remedial action and the time by which the corrective or remedial action must be completed, as provided in § 34.44;

(C) Whether it will be necessary for the respondent to enter into a written agreement, as provided in § 34.45; and

(D) The opportunity to engage in voluntary compliance negotiations.

(ii) Where a no cause determination is made, the complainant and the respondent shall be so notified in writing. Such determination represents final agency action of the Department.

§ 34.44 Corrective and remedial action.

(a) A Letter of Findings, Notice to Show Cause, or Initial Determination, issued pursuant to §§ 34.40, 34.41 or 34.43 respectively, shall include the specific steps the grant applicant or recipient, as applicable, must take within a stated period of time in order to achieve voluntary compliance.

(b) Such steps shall include, but are not limited to:

(1) Actions to end and/or redress the violation of the nondiscrimination and equal opportunity provisions of JTPA or this part;

(2) Make whole relief where discrimination has been identified, including, as appropriate, back pay (which shall not accrue from a date more than 2 years prior to the filing of the complaint or the initiation of a compliance review) or other monetary relief; hire or reinstatement; retroactive seniority; promotion; benefits or other services discriminatorily denied; and

(3) Such other remedial or affirmative relief as the Director deems necessary, including but not limited to outreach, recruitment and training designed to ensure equal opportunity.

(c) Monetary relief may not be paid from Federal funds.

§ 34.45 Notice of violation; written assurances; Conciliation Agreements.

(a) *State Programs.* (1) Violations at State-office level. Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part has occurred at the State-office level, he or she shall notify the Governor through the issuance of a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, pursuant to §§ 34.40, 34.41 or 34.43 respectively. The Director may secure compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part through, among other means, the execution of a written assurance and/or Conciliation Agreement, pursuant to paragraph (d) of this section.

(2) Violations below State-office level. Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part has occurred below the State-office level, the Director shall so notify the Governor and the violating recipient(s) through the issuance of a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, pursuant to §§ 34.40, 34.41 or 34.43 respectively.

(i) Such issuance shall: (A) Direct the Governor to initiate negotiations immediately with the violating recipient(s) to secure compliance by voluntary means;

(B) Direct the Governor to complete such negotiations within 30 days of the Governor's receipt of the Notice to Show Cause or within 45 days of the Governor's receipt of the Letter of Findings or Initial Determination, as applicable. The Director reserves the right to enter into negotiations with the recipient at any time during the period. For good cause shown, the Director may approve an extension of time to secure voluntary compliance. The total time allotted to secure voluntary compliance shall not exceed 60 days.

(C) Include a determination as to whether compliance should be achieved by: Immediate correction of the violation(s) and written assurance that such violations have been corrected, pursuant to paragraph (d)(1) of this section; entering into a written Conciliation Agreement pursuant to paragraph (d)(2) of this section; or both.

(ii) If the Governor determines, at any time during the period described in paragraph (a)(2)(i)(B), that a recipient's compliance cannot be achieved by voluntary means, the Governor shall so notify the Director.

(iii) If the Governor is able to secure voluntary compliance pursuant to paragraph (a)(2)(i) of this section, he or she shall submit to the Director for approval, as applicable: written assurance that the required action has been taken, as described in paragraph (d)(1) of this section; and/or a copy of the Conciliation Agreement, as described in paragraph (d)(2) of this section.

(iv) The Director may disapprove any written assurance or Conciliation Agreement submitted for approval pursuant to paragraph (a)(2)(iii) of this section that fails to satisfy each of the applicable requirements provided in paragraph (d) of this section.

(b) *National Programs.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of JTPA or this part has occurred in a National Program, he or she shall notify the National Program recipient by issuing a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, pursuant to §§ 34.40, 34.41 or 34.43 respectively. The Director may secure compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part through, among other means, the execution of a written assurance and/or Conciliation Agreement pursuant to paragraph (d) of this section, as applicable.

(c) *Written assurance; Conciliation Agreement.* (1) Written assurance. A written assurance developed pursuant to this section must provide documentation that the violations listed in the Letter of Findings, Notice to Show Cause or Initial Determination, as applicable, have been corrected.

(2) Conciliation Agreement. A Conciliation Agreement developed pursuant to this section must:

(i) Be in writing;

(ii) Address each cited violation;

(iii) Specify the corrective or remedial action to be taken within a stated period of time to come into compliance;

(iv) Provide for periodic reporting, as determined by the Director, on the status of the corrective and remedial action;

(v) Provide that the violation(s) will not recur; and

(vi) Provide for enforcement for a breach of the agreement.

§ 34.46 Final Determination.

(a) The Director shall conclude that compliance cannot be secured through informal means when:

(1) The grant applicant or recipient fails or refuses to correct the violation(s) within the applicable time period established by the Letter of Findings, Notice to Show Cause or Initial Determination; or

(2) The Director has not approved an extension of time in which to secure voluntary compliance, pursuant to § 34.45(a)(2)(i)(B), and:

(i) Has not received notification pursuant to § 34.45(a)(2)(iii) that voluntary compliance has been achieved; or

(ii) Has disapproved a written assurance or Conciliation Agreement, pursuant to § 34.45(a)(2)(iv); or

(iii) Has received notice from the Governor, pursuant to § 34.44(a)(2)(ii), that voluntary compliance cannot be achieved.

(b) Upon so concluding, the Director may:

(1) Issue a Final Determination which shall:

(i) Specify the efforts made to achieve voluntary compliance and indicate that those efforts have been unsuccessful;

(ii) Identify those matters upon which the Directorate and the grant applicant or recipient continue to disagree;

(iii) List any modifications to the findings of fact or conclusions set forth in the Initial Determination, Notice to Show Cause or Letter of Findings;

(iv) Determine the liability of the grant applicant or recipient, as applicable, and establish the extent of the liability, as appropriate;

(v) Describe the corrective or remedial action that must be taken for the grant applicant or recipient to come into compliance;

(vi) Indicate that the failure of the grant applicant or recipient to come into compliance within 10 days of the receipt of the Final Determination may result, after opportunity for a hearing, in the termination or denial of the grant, or discontinuation of assistance, as appropriate, or in referral to the Department of Justice with a request to file suit;

(vii) Advise the grant applicant or recipient of the right to request a hearing, and reference the applicable procedures at § 34.51; and

(viii) Determine the Governor's liability, if any, in accordance with the provisions of § 34.32; or

(2) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or

(3) Take such other action as may be provided by law.

§ 34.47 Notice of finding of noncompliance.

Where a compliance review or complaint investigation results in a finding of noncompliance, the Director shall so notify: (a) the Departmental granting agency; and (b) the Assistant Attorney General.

§ 34.48 Notification of Breach of Conciliation Agreement.

(a) Where a Governor is a party to a Conciliation Agreement, the Governor shall immediately notify the Director of a recipient's breach of any such Conciliation Agreement.

(b) When it becomes known to the Director, through the Governor or by other means, that a Conciliation Agreement has been breached, the Director may issue a Notification of Breach of Conciliation Agreement.

(c) A Notification of Breach of Conciliation Agreement issued pursuant to this section shall be directed, as applicable, to the Governor and/or other party(ies) to the Conciliation Agreement.

(d) A Notification of Breach of Conciliation Agreement issued pursuant to paragraph (a) of this section shall:

(1) Specify the efforts made to achieve voluntary compliance and indicate that those efforts have been unsuccessful;

(2) Identify the specific provisions of the Conciliation Agreement violated;

(3) Determine liability for the violation and the extent of the liability, as appropriate;

(4) Indicate that failure of the violating party to come into compliance within 10 days of the receipt of the Notification of Breach of Conciliation Agreement may result, after opportunity for a hearing, in the termination or denial of the grant, or discontinuation of assistance, as appropriate, or in referral to the Department of Justice with a request from the Department to file suit;

(5) Advise the violating party of the right to request a hearing, and reference the applicable procedures at § 34.51(b); and

(6) Include a determination as to the Governor's liability, if any, in accordance with the provisions of § 34.32.

(e) Where enforcement action pursuant to a Notification of Breach of Conciliation Agreement is commenced, the Director shall so notify: the Departmental granting agency; and the Governor, recipient or grant applicant, as applicable.

Subpart E—Federal Procedures For Effecting Compliance

§ 34.50 General.

(a) *Sanctions; judicial enforcement.* If, following issuance of a Final Determination pursuant to § 34.46, or a Notification of Breach of Conciliation Agreement pursuant to § 34.48, compliance has not been achieved, the Secretary may:

(1) After opportunity for a hearing, suspend, terminate, deny or discontinue the Federal financial assistance under JTPA, in whole or in part;

(2) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or

(3) Take such action as may be provided by law.

(b) *Deferral of new grants.* When termination proceedings under § 34.51 have been initiated, the Department may defer action on applications for new financial assistance under JTPA until a Final Decision under § 34.52 has been rendered. Deferral is not appropriate when financial assistance under JTPA is due and payable under a previously approved application.

(1) New Federal financial assistance under JTPA includes all assistance for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period.

(2) New Federal financial assistance under JTPA does not include assistance approved prior to the beginning of termination proceedings or increases in funding as a result of changed computations of formula awards.

§ 34.51 Hearings.

(a) *Notice of opportunity for hearing.* As part of a Final Determination, or a Notification of Breach of a Conciliation Agreement, the Director shall include, and serve on the grant applicant or recipient (by certified mail, return receipt requested), a notice of opportunity for hearing.

(b) *Complaint; request for hearing; answer.*

(1) In the case of noncompliance which cannot be voluntarily resolved, the Final Determination or Notification of Breach of Conciliation Agreement shall be deemed the Department's formal complaint.

(2) To request a hearing, the grant applicant or recipient must file a written answer to the Final Determination or Notification of Breach of Conciliation Agreement, and a copy of the Final Determination or Notification of Breach of Conciliation Agreement, with the Office of the Administrative Law Judges.

(i) The answer must be filed within 30 days of the date of receipt of the Final Determination or Notification of Breach of Conciliation Agreement.

(ii) A request for hearing must be set forth in a separate paragraph of the answer.

(iii) The answer shall specifically admit or deny each finding of fact in the Final Determination or Notification of Breach of Conciliation Agreement. Where the grant applicant or recipient does not have knowledge or information sufficient to form a belief, the answer may so state and the statement shall have the effect of a denial. Findings of fact not denied shall be deemed admitted. The answer shall separately state and identify matters alleged as affirmative defenses and shall also set forth the matters of fact and law relied on by the grant applicant or recipient.

(3) The grant applicant or recipient must simultaneously serve a copy of its filing on the Office of the Solicitor, Civil Rights Division, Room N–2464, U.S. Department of Labor, 200 Constitution Avenue NW., Washington DC 20210.

(4)(i) The failure of a grant applicant or recipient to request a hearing under this paragraph, or to appear at a hearing for which a date has been set, is deemed

to be a waiver of the right to a hearing; and

(ii) Whenever a hearing is waived, all allegations of fact contained in the Final Determination or Notification of Breach of Conciliation Agreement shall be deemed admitted and the Final Determination or Notification of Breach of Conciliation Agreement shall be deemed the Final Decision of the Secretary as of the day following the last date by which the grant applicant or recipient was required to request a hearing or was to appear at a hearing. See § 34.52(b)(3).

(c) *Time and place of hearing.* Hearings shall be held at a time and place ordered by the Administrative Law Judge upon reasonable notice to all parties and, as appropriate, the complainant. In selecting a place for the hearing, due regard shall be given to the convenience of the parties, their counsel, if any, and witnesses.

(d) *Judicial process; evidence.*

(1) The Administrative Law Judge may use judicial process to secure the attendance of witnesses and the production of documents pursuant to Section 9 of the Federal Trade Commission Act (15 U.S.C. 49).

(2) Evidence. In any hearing or administrative review conducted pursuant to this part, evidentiary matters shall be governed by the standards and principles set forth in the Uniform Rules of Evidence issued by the Department of Labor's Office of Administrative Law Judges, 29 CFR part 18.

§ 34.52 Decision and post-termination proceedings.

(a) *Initial Decision.* After the hearing, the Administrative Law Judge shall issue an initial decision and order, containing findings and conclusions. The initial decision and order shall be served on all parties by certified mail, return receipt requested.

(b) *Exceptions; Final Decision.* (1) Final decision after a hearing. The initial decision and order shall become the Final Decision and Order of the Secretary unless exceptions are filed by a party or, in the absence of exceptions, the Secretary serves notice that the Secretary shall review the decision.

(i) A party dissatisfied with the initial decision and order may, within 45 days of receipt, file with the Secretary and serve on the other parties to the proceedings and on the Administrative Law Judge, exceptions to the initial decision and order or any part thereof.

(ii) Upon receipt of exceptions, the Administrative Law Judge shall index and forward the record and the initial decision and order to the Secretary within three days of such receipt.

(iii) A party filing exceptions must specifically identify the finding or conclusion to which exception is taken. Any exception not specifically urged shall be deemed to have been waived.

(iv) Within 45 days of the date of filing such exceptions, a reply, which shall be limited to the scope of the exceptions, may be filed and served by any other party to the proceeding.

(v) Requests for extensions for the filing of exceptions or replies thereto must be received by the Secretary no later than 3 days before the exceptions or replies are due.

(vi) If no exceptions are filed, the Secretary may, within 30 days of the expiration of the time for filing exceptions, on his or her own motion serve notice on the parties that the Secretary will review the decision.

(vii) Final Decision and Order. (A) Where exceptions have been filed, the initial decision and order of the Administrative Law Judge shall become the Final Decision and Order of the Secretary unless the Secretary, within 30 days of the expiration of the time for filing exceptions and any replies thereto, has notified the parties that the case is accepted for review. (B) Where exceptions have not been filed, the initial decision and order of the Administrative Law Judge shall become the Final Decision and Order of the Secretary unless the Secretary has served notice on the parties that the Secretary will review the decision, as provided in paragraph (b)(1)(vi) of this section.

(viii) Any case reviewed by the Secretary pursuant to this paragraph shall be decided within 180 days of the notification of such review. If the Secretary fails to issue a Final Decision and Order within the 180-day period, the initial decision and order of the Administrative Law Judge shall become the Final Decision and Order of the Secretary.

(2) Final Decision where a hearing is waived.

(i) If, after issuance of a Final Determination pursuant to § 34.46(a) or Notification of Breach of Conciliation Agreement pursuant to § 34.48, voluntary compliance has not been achieved within the time set by this part and the opportunity for a hearing has been waived as provided for in § 34.51(b)(3), the Final Determination or Notification of Breach of Conciliation Agreement shall be deemed the Final Decision of the Secretary.

(ii) When a Final Determination or Notification of Breach of Conciliation Agreement is deemed the Final Decision of the Secretary, the Secretary may, within 45 days, issue an order terminating or denying the grant or continuation of assistance or imposing other appropriate sanctions for the grant applicant or recipient's failure to comply with the required corrective and/or remedial actions, or referring the matter to the Attorney General for further enforcement action.

(3) Final agency action. A Final Decision and Order issued pursuant to § 34.52(b) constitutes final agency action.

(c) *Post-termination proceedings.* (1) A grant applicant or recipient adversely affected by a Final Decision and Order issued pursuant to paragraph (b) of this section shall be restored, where appropriate, to full eligibility to receive Federal financial assistance under JTPA if it satisfies the terms and conditions of such Final Decision and Order and brings itself into compliance with the nondiscrimination and equal opportunity provisions of JTPA and this part.

(2) A grant applicant or recipient adversely affected by a Final Decision and Order issued pursuant to paragraph (b) of this section may at any time petition the Director to restore its eligibility to receive Federal financial assistance under JTPA. A copy of the petition shall be served on the parties to the original proceeding which led to the Final Decision and Order issued pursuant to paragraph (b) of this section. Such petition shall be supported by information showing the actions taken by the grant applicant or recipient to comply with the requirements of paragraph (c)(1) of this section. The grant applicant or recipient shall have the burden of demonstrating that it has satisfied the requirements of paragraph (c)(1) of this section. Restoration to eligibility may be conditioned upon the grant applicant or recipient entering into a consent decree. While proceedings under this section are pending, sanctions imposed by the Final Decision and Order under paragraphs (b) (1) and (2) of this section shall remain in effect.

(3) The Director shall issue a written decision on the petition for restoration.

(i) If the Director determines that the requirements of paragraph (c)(1) of this section have not been satisfied, he or she shall issue a decision denying the petition.

(ii) Within 30 days of its receipt of the Director's decision, the recipient or grant applicant may file a petition for review of the decision by the Secretary, setting forth the grounds for its objection to the Director's decision.

(iii) The petition shall be served on the Director and on the Office of the Solicitor, Civil Rights Division.

(iv) The Director may file a response to the petition within 14 days.

(v) The Secretary shall issue the final agency decision denying or granting the recipient's or grant applicant's request for restoration to eligibility.

§ 34.53 Suspension, termination, denial or discontinuance of Federal financial assistance under JTPA; alternate funds disbursal procedure.

(a) Any action to suspend, terminate, deny or discontinue Federal financial assistance under JTPA shall be limited to the particular political entity, or part thereof or other recipient (or grant applicant) as to which the finding has been made and shall be limited in its effect to the particular program, or part thereof, in which the noncompliance has been found. No order suspending, terminating, denying or discontinuing Federal financial assistance under JTPA shall become effective until:

(1) The Director has issued a Final Determination pursuant to § 34.46 or Notification of Breach of Conciliation Agreement pursuant to § 34.48;

(2) There has been an express finding on the record, after opportunity for a hearing, of failure by the grant applicant or recipient to comply with a requirement imposed by or pursuant to the nondiscrimination and equal opportunity provisions of JTPA or this part;

(3) A Final Decision has been issued by the Secretary, the Administrative Law Judge's decision and order has become the Final Decision of the Secretary, or the Final Determination or Notification of Conciliation Agreement has been deemed the Final Decision of the Secretary, pursuant to § 34.52(b); and

(4) The expiration of 30 days after the Secretary has filed, with the committees of Congress having legislative jurisdiction over the program involved, a full written report of the circumstances and grounds for such action.

(b) When the Department withholds funds from a recipient or grant applicant under these regulations, the Secretary may disburse the withheld funds directly to an alternate recipient. In such case, the Secretary will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the nondiscrimination and equal opportunity provisions of JTPA.

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Friday
January 15, 1993

Part III

Environmental Protection Agency

40 CFR Part 82
Protection of Stratospheric Ozone; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–4553–4]

Protection of Stratospheric Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule establishes regulations to ban nonessential products releasing Class I ozone-depleting substances under section 610 of the Clean Air Act (the Act), as amended. This rulemaking prohibits the sale, distribution, or offer of sale or distribution, in interstate commerce of certain products containing or produced with CFCs after specified dates. In addition, it restricts the sale of chlorofluorocarbon-containing cleaning fluids for electronic and photographic equipment to commercial entities.

The products affected by this rulemaking use or contain chlorofluorocarbons (CFCs), the chemicals designated as Group I or Group III substances by the Clean Air Act, as amended in 1990. The products affected by this rulemaking include chlorofluorocarbon-propelled plastic party streamers and noise horns; chlorofluorocarbon-containing cleaning fluids for electronic and photographic equipment; plastic flexible and packaging foams produced with CFCs, except foam used in coaxial cable; and all aerosol products and pressurized dispensers containing chlorofluorocarbons except the following products: certain medical devices, lubricants, coatings or cleaning fluids for electrical or electronic equipment that contain CFC–11, CFC–12, or CFC–113, but no other CFCs, for nonpropellant purposes only; lubricants, coatings or cleaning fluids for aircraft maintenance that contain CFC–11 or CFC–113, but no other CFCs; mold release agents that contain CFC–11 or CFC–113, but no other CFCs, and that are used in the production of plastic and elastomeric materials; spinnerette lubricant/cleaning sprays that contain CFC–114, but no other CFCs, and that are used for synthetic fiber production; containers of CFCs used in plasma etching; document preservation sprays that contain CFC–113, but no other CFCs; and red pepper bear repellent sprays that contain CFC–113, but no other CFCs.

DATES: This final rule bans the sale, distribution, or offer of sale or distribution, in interstate commerce of the products specifically mentioned in § 82.66(a) effective on February 16, 1993. This rulemaking also bans the sale or distribution of the products specifically mentioned in § 82.66(b) effective on February 16, 1993. Finally, this rulemaking bans the sale, distribution, or offer of sale or distribution, in interstate commerce of the other products identified in this rulemaking as nonessential effective January 17, 1994.

ADDRESSES: Comments and materials supporting this rulemaking are contained in Air Docket No. A–91–39 (Docket) at: U.S. Environmental Protection Agency (LE–131), 401 M Street, SW., Washington, DC 20460. The Docket is located in room M–1500, First Floor Waterside Mall. Materials relevant to this rulemaking may be inspected from 8:30 a.m. to 12 noon and from 1:30 to 3:30 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Matthew C. Dinkel at (202) 233–9200, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation, 6202J, 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Background

A. Overview of the Problem

The stratospheric ozone layer protects the earth from ultraviolet (UV–B) radiation. Research conducted in the 1970s indicated that when certain industrially produced halocarbons (including chlorofluorocarbons, halons,

carbon tetrachloride and methyl chloroform) are released into the environment, they migrate into the stratosphere, where they contribute to the depletion of the ozone layer. To the extent depletion occurs, penetration of the atmosphere by UV–B radiation increases. Increased exposure to UV–B radiation produces health and environmental damage, including increased incidence of skin cancer and cataracts, suppression of the immune system, damage to crops and aquatic organisms, increased formation of ground-level ozone and increased weathering of outdoor plastics.

B. Aerosol Ban in 1978

The initial hypothesis linking chlorofluorocarbons and depletion of the stratospheric ozone layer appeared in a paper by Mario J. Molina and F.S. Rowland in 1974. Since that time, the scientific community has made remarkable advances in understanding atmospheric processes affecting stratospheric ozone and in analyzing data measuring ozone depletion, both over the polar regions and globally. In response to the initial research indicating that CFCs could cause stratospheric ozone depletion, EPA, the Consumer Product Safety Commission, and the Food and Drug Administration (FDA) acted on March 17, 1978 (43 FR 11301; 43 FR 11318) to ban the use of CFCs as aerosol propellants in all but "essential applications." During the mid-1970s, the use of CFCs as aerosol propellants constituted over 50 percent of total CFC consumption in the United States. The 1978 ban reduced the use of CFCs in aerosols in this country by approximately 95 percent, eliminating nearly half of the total U.S. consumption of these chemicals.

Some CFC aerosol products were specifically exempted from the ban based on a determination of "essentiality" (See Essential Use Determinations-Revised, 1978). Other pressurized dispensers containing CFCs were excluded from the ban because they did not fit the narrow definition of "aerosol propellant."

In the years following the aerosol ban, CFC use increased significantly in refrigeration, foam and solvent applications. By 1985, CFC use in the United States had surpassed pre-1974 levels and represented 29 percent of total global CFC consumption.

C. Montreal Protocol

Scientific research in the late 1970s and early 1980s produced additional evidence that chlorine and bromine could destroy stratospheric ozone on a global basis. In 1985, scientists discovered the existence of a substantial seasonal reduction in stratospheric ozone (an ozone "hole") over Antarctica each year. Subsequent studies linked this phenomenon to CFCs and suggested that some depletion of global stratospheric ozone levels had already occurred. In response to this research, many members of the international community began discussing the need for an international agreement to reduce global production of ozone-depleting substances. Because releases of CFCs from all areas mix in the atmosphere to affect stratospheric ozone globally, efforts to reduce emissions from specific products by only a few nations could quickly be offset by increases in emissions from other nations, leaving the risks to the ozone layer unchanged. EPA evaluated the risks of ozone depletion in Assessing the Risks of Trade Gases That Can Modify the Stratosphere (1987) and concluded that an international approach was necessary to effectively safeguard the ozone layer.

EPA participated in negotiations organized by the United Nations Environment Programme (UNEP) to achieve an international agreement to protect the ozone layer. In September 1987, the United States and 22 other countries signed the Montreal Protocol on Substances that Deplete the Ozone Layer. The 1987 Protocol called for a freeze in the production and consumption (defined as production plus imports minus exports of bulk chemicals) of CFC–11, –12, –113, –114, –115, and halon 1211, 1301 and 2402 at 1986 levels beginning in 1989, and a phased reduction of the CFCs to 50 percent of 1986 levels by 1998. Currently, 83 nations representing over 90 percent of the world's consumption are parties to the Protocol.

In its August 12, 1988 final rulemaking (53 FR 30566) EPA promulgated regulations implementing the requirements of the 1987 Protocol through a system of tradable allowances. EPA apportioned these allowances to producers and importers of these "controlled substances" based on their 1986 levels. To monitor industry's compliance with the production and consumption limits, EPA required recordkeeping and quarterly reporting and conducted periodic compliance reviews and inspections. This regulation took effect July 1, 1989.

D. Excise Tax

As part of the Omnibus Budget Reconciliation Act of 1989, the United States Congress levied an excise tax on the sale of CFCs and other chemicals which deplete the ozone layer, with specific exemptions for exports and recycling. The tax went into effect on January 1, 1990, and increases annually. By raising the cost of virgin controlled substances, the tax has created an incentive for industry to shift out of these substances and increase recycling activities, and it has encouraged the development of a market for alternative chemicals and processes. The original excise tax was amended by the Omnibus Budget Reconciliation Act of 1990 to include methyl chloroform, carbon tetrachloride and the other CFCs regulated by the amended Montreal Protocol and title VI of the Clean Air Act, as amended in 1990. The Energy Policy Act of 1992 revised and further increased the excise tax effective January 1, 1993.

E. London Amendments to the Montreal Protocol

Under the Montreal Protocol, the Parties are required to assess the science, economics and alternative technologies related to protection of the ozone layer every two years. In response to this requirement, the Parties issued their first scientific assessment in 1989 (see Environmental Effects Panel Report). In preparing the first scientific assessment required under the Protocol, scientists examined the data from the land-based monitoring stations and the total ozone measurement spectrometer (TOMS) satellite data and concluded that there had been global ozone depletion over the northern hemisphere as well. The scientific assessment reported that a three to five percent decrease in ozone levels had occurred between 1969 and 1986 in the northern hemisphere in the winter months that could not be attributed to known natural processes. In addition, further studies of the Antarctic ozone hole implicated chlorine as the main cause of ozone depletion over the Antarctic, and linked high chlorine concentrations to CFCs and other chlorinated and brominated compounds.

At the Second Meeting of the Protocol Parties, held in London on June 29, 1990, the Parties responded to this new evidence by reassessing and tightening the restrictions placed on these chemicals. The Parties to the Protocol passed amendments and adjustments which called for a full phaseout of the regulated CFCs and halons by 2000, a phaseout of carbon tetrachloride and "other CFCs" by 2000 and a phaseout of methyl chloroform by 2005. The Parties also passed a non-binding resolution regarding the use of hydrochlorofluorocarbons (HCFCs) as interim substitutes for CFCs. Partially halogenated HCFCs add much less chlorine to the stratosphere than the

fully halogenated CFCs, but still pose a significant threat to the ozone layer (See 56 FR 2420, January 22, 1991 for more information on the relative effects of different ozone-depleting substances).

F. Clean Air Act Amendments of 1990, Title VI

On November 15, 1990 the Clean Air Act Amendments of 1990 were signed into law. The Act required EPA to publish two lists of ozone-depleting substances, based on their ozone-depleting potentials (ODPs). The Act categorized CFCs, halons, carbon tetrachloride and methyl chloroform as Class I substances, substances that possess a high potential for destroying stratospheric ozone molecules. It also designated hydrochlorofluorocarbons as Class II substances, substances with a lesser, but still significant ozone depletion potential.

The other requirements in title VI of the amended Act include phaseout controls similar to those in the London Amendments, although the interim targets are more stringent and the phaseout date for methyl chloroform is earlier (2002). EPA has already promulgated regulations implementing the phaseout provisions contained in section 604 of the Act (57 FR 33754, July 30, 1992). Unlike the amended Montreal Protocol, the Clean Air Act, as amended, also restricts the uses of controlled ozone-depleting substances, including provisions to reduce emissions of controlled substances to the "lowest achievable level" in all use sectors (section 608); requires the recovery and recycling of refrigerant when servicing motor vehicle air conditioners (section 609); bans nonessential products (section 610); mandates warning labels (section 611); establishes a safe alternatives program (section 612); and requires revision of federal procurement policies to minimize government use of ozone-depleting substances (section 613). With the exception of the rulemakings implementing the phaseout (57 FR 33754, July 30, 1992) and section 609 (57 FR 31242, July 14, 1992), EPA is currently in the process of promulgating regulations pursuant to these statutory provisions.

One of the provisions of the Act which complements the nonessential products ban under section 610 is the Significant New Alternatives Policy (SNAP) program established under section 612. The SNAP program has been established to evaluate the overall effects on human health and the environment of the potential substitutes for ozone-depleting substances. The SNAP program is a powerful tool to identify substitutes that may pose unnecessary environmental hazards. Through review of substitutes, the Agency can ensure that environmentally preferable alternatives will be developed. Rules promulgated under SNAP will render it unlawful to replace on ozone-depleting substance with a substitute chemical or technology that may present adverse effects to human health and the environment if the Administrator determines that some other alternative is commercially available and that this alternative poses a lower overall threat to human health and the environment.

It is important to note that the SNAP program will promote the widest range of environmentally acceptable substitutes. The SNAP program will in no case ban all of the available substitutes. Under section 612, the SNAP program is only authorized to prohibit a particular substitute for a Class I or Class II substance when another, less environmentally harmful substitute is available. Consequently, there is no possibility that the effect of today's rulemaking and subsequent regulatory action under section 612 will be to ban the use of all available substitutes in a particular application.

G. Accelerated Phaseout

Significant scientific advances have continued since the 1989 Protocol assessments. Several reports since that time have indicated that ozone depletion is occurring more rapidly than was previously believed. The most recent Protocol Scientific Assessment was issued on December 17, 1991. The report, entitled Scientific Assessment of Ozone Depletion: 1991, analyzed information collected from ground- and satellite-based monitoring instruments. This information indicated that there had been significant decreases in total-column ozone in winter, in both the northern and southern hemispheres at middle and high latitudes. This data also indicated, for the first time, the depletion of stratospheric ozone in these latitudes in spring and summer as well. The study reported no significant depletion in the tropics. The TOMS data indicated that for the period 1979 to 1991, decreases in total ozone at 45 degrees south ranged between 4.4 percent in the fall to as much as 6.2 percent in the summer, while depletion at 45 degrees north ranged between 1.7 percent in the fall to 5.6 percent in the winter. Data from the ground-based Dobson network confirmed these losses in total column ozone during the twelve-year period, but these findings show almost twice as much depletion as the average rate measured by the ground-based network alone over a twenty-year period. Based on this new data, scientists have concluded that the ozone in the stratosphere during the 1980s disappeared at a much faster rate than experienced in the previous decade.

The recent UNEP Scientific Assessment also included new data on the estimated ozone depletion potentials (ODPs) of ozone-depleting substances. The assessment placed the ODP of methyl bromide, a chemical previously thought to have an insignificant effect on stratospheric ozone, at 0.6, with a range of uncertainty between 0.44–0.69. The Executive Summary of the Assessment stated that, "if the anthropogenic sources of methyl bromide are significant and their emissions can be reduced, then *each* ten percent reduction in methyl bromide would rapidly result in a decrease in stratospheric bromide of 1.5 pptv (parts per trillion by volume), which is equivalent to a reduction in chlorine of 0.045 to 0.18 ppbv (parts per billion by volume). This gain is comparable to that of a three-year acceleration of the scheduled phaseout of the CFCs."

Several months after the release of the Scientific Assessment, on February 3, 1992, NASA released preliminary data acquired by the ongoing Arctic Airborne Stratospheric Experiment-II (AASE–II), a series of high-altitude instrument-laden plane flights over the northern hemisphere (see Interim Findings: Second Airborne Arctic Stratospheric Expedition). Additional data were also obtained from the initial observations by NASA's Upper Atmosphere Research Satellite (UARS), launched in September 1991. The measurements showed higher levels of chlorine oxide (ClO) (the key agent responsible for stratospheric ozone depletion) over Canada and New England than were observed during any previous series of aircraft flights. These levels are only partially explainable by enhanced aerosol surface reactions due to the emissions from the Mount Pinatubo volcano. The expedition also found that the levels of hydrogen chloride (HCl), a chemical species that stores atmospheric chlorine, were observed to be low, providing new evidence for the existence of chemical processes that convert stable forms of chlorine into ozone-destroying species. The high ClO and bromide oxide (BrO) levels observed indicated that human-induced rates of ozone destruction could be as high as one to two percent per day for short periods of time beginning in late January.

In addition, the levels of nitrogen oxides (NO_x) were also observed to be

low, providing evidence of reactions that take place on the surface of aerosols that diminish the ability of the atmosphere to control the buildup of chlorine radicals. New observations of HCl and nitrogen oxide (NO) imply that chlorine and bromide are more effective in destroying ozone than previously believed.

The NASA findings indicate that in late January of 1992, the Arctic air was chemically "primed" for the potential formation of a springtime ozone "hole" similar to that formed each spring over Antarctica. These findings also are consistent with theories that ozone depletion may occur on aerosols anywhere around the globe, and not only on polar stratospheric clouds as was previously believed.

After collecting more data, NASA released an April 30, 1992 "End of Mission Statement," which indicated that while a rise in stratospheric temperatures in late January apparently prevented severe ozone depletion from occurring in the Arctic this year, observed ozone levels were nonetheless lower than had previously been recorded for this time of year. This information has further increased the Agency's concern that significant ozone loss may occur over populated regions of the earth, thus exposing humans, plants and animals to harmful levels of UV–B radiation, and adds support to the need for further efforts to limit emissions of anthropogenic chlorine and bromide.

In response to these findings, President Bush announced on February 11, 1992 that the United States would unilaterally accelerate the phaseout schedule for ozone-depleting substances, and he called upon other nations to agree to an accelerated phaseout schedule as well. At the Fourth Meeting of the Parties to the Montreal Protocol, held in Copenhagen, Denmark on November 25, 1992, the Parties adopted a more stringent phaseout schedule. Under the new agreement, CFC production will be capped at 25 percent of the 1986 baseline in 1994, and production of CFCs, carbon tetrachloride, and methyl chloroform for all but essential uses will be completely phased out by 1996. Production of halons, except for essential uses, will be phased out by 1994. EPA has begun the rulemaking process for implementing this accelerated phaseout.

The accelerated phaseout will have a significant impact upon the products affected by today's rulemaking. The combined effects of the excise tax and the original phaseout schedule have already created strong incentives for industry to find substitutes for Class I substances. In fact, current U.S. production of Class I substances is more than 40 percent below the levels set by the Montreal Protocol. The accelerated phaseout will significantly increase the incentives for Class I substance users to switch to alternatives. Consequently, even where a particular use of a Class I substance is not included in the nonessential products ban, the substance in question will rapidly become scarce and expensive, and industry will be forced to find alternative chemicals or processes.

The accelerated phaseout dramatically reduces the need for aggressive EPA action under section 610. When Congress passed the Clean Air Act Amendments of 1990, it required the phaseout of the production of Class I substances by the year 2000. Consequently, there was a period of eight years in which the Class I nonessential products ban would have had an effect on manufacturers of these products. However, the Montreal Protocol Parties' decision to end production of CFCs by January 1, 1996 means that the ban on nonessential products authorized in section 610(b)(3) will only be in effect for two years before the complete phaseout takes effect. As a result, EPA believes that other provisions of title VI provide more effective and efficient means of implementing the Act's goals of protecting the earth's stratospheric ozone layer.

The final rule reflects this belief by banning only those products specified in sections 610(b) and 610(d) that contain Class I substances. Section 610(d)(1) is self-executing and bans the sale or distribution of foam and aerosol products containing or produced with Class II substances after January 1, 1994 unless an exception is granted under paragraph 610(d)(2). The Agency believes that aerosols and plastic flexible and packaging foams containing or produced with Class I substances should also be subject to the nonessential products ban to avoid providing incentives for manufacturers to revert to CFC use when the less environmentally harmful Class II substances are banned in these applications after January 1, 1994 under section 610(d). Moreover, the Agency believes that the use of CFCs in these two sectors is nonessential; as discussed elsewhere in this preamble, a number of substitutes for CFCs have already been adopted in these sectors. The fact that the affected industries have already largely made the transition out of CFCs may have encouraged Congress to ban the use of Class II substances in aerosols and noninsulating foams under section 610(d) of the statute.

H. Requirements Under Section 610

1. Class I Products

Title VI of the Act divides ozone-depleting chemicals into two distinct classes based on their ability to destroy ozone in the stratosphere. Class I substances are those substances identified as such in section 602, as well as any substance subsequently identified that has an ozone depletion potential (ODP) of 0.2 or greater (ozone depletion potential reflects the destructiveness of an ozone-depleting substance relative to CFC–11). Class I is comprised of CFCs, halons, carbon tetrachloride and methyl chloroform. Class II substances have ODPs lower than 0.2; at this time, Class II consists exclusively of HCFCs (see listing notice, January 22, 1991; 56 FR 2420). EPA is currently evaluating other substances to determine whether they meet the criteria for Class I or Class II substances.

Section 610(b) of the Act calls on EPA to identify nonessential products that release Class I substances into the environment (including any release during manufacture, use, storage, or disposal) and to prohibit any person from selling or distributing any such product, or offering any such product for sale or distribution, in interstate commerce.

Section 610(b) (1) and (2) specifies products to be prohibited under this requirement, including "chlorofluorocarbon-propelled plastic party streamers and noise horns" and "chlorofluorocarbon-containing cleaning fluids for noncommercial electronic and photographic equipment."

Section 610(b)(3) extends the prohibition to other products determined by EPA to release Class I substances and to be nonessential. In determining whether a product is nonessential, EPA is to consider the following criteria: the purpose or intended use of the product, the technological availability of substitutes for such product and for such Class I substance, safety, health, and other relevant factors.

Section 610(a) provides that EPA is to promulgate final regulations for the Class I products ban within one year after enactment of the Clean Air Act Amendments of 1990 (November 15, 1991). Section 610(b) provides that 24 months after enactment (November 15, 1992), it shall be unlawful to sell or distribute any nonessential product to which regulations under section 610 apply. Since this rulemaking

implementing section 610(b) has been published after November 15, 1992, there were no prohibitions on nonessential products in effect. This regulation will take effect on February 16, 1993.

2. Class II Products

Section 610(d) (1) states that after January 1, 1994, it shall be unlawful for any person to sell or distribute, or offer for sale or distribution, in interstate commerce—(A) any aerosol product or other pressurized dispenser which contains a Class II substance; or (B) any plastic foam product which contains, or is manufactured with, a Class II substance. Section 610(d)(2) authorized EPA to grant exceptions to the Class II ban in certain circumstances.

EPA believes that, unlike the Class I ban, the Class II ban is self-executing and that, consequently, EPA is not required to promulgate regulations within one year of enactment under section 610 to implement the Class II ban.[1] Section 610(d) bans the sale of the specified Class II products without any reference to required regulations. EPA believes it has the authority to issue regulations as necessary to implement the Class II ban under sections 610 and 301 of the Clean Air Act, as amended, and intends to do so at a later date in order to establish a procedure for granting exceptions under section 610(d)(2). This will not, however, affect the effective date of the Class II ban. EPA is currently in the process of drafting proposed regulations for this purpose.

3. Medical Products

Section 610(e) states that nothing in this section shall apply to any medical devices as defined in section 601(8). Section 601(8) defines "medical device" as any device (as defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)) diagnostic product, drug (as defined in the Federal Food, Drug, and Cosmetic Act), and drug delivery system—(A) if such device, product, drug, or drug delivery system utilizes a Class I or Class II substance for which no safe and effective alternative has been developed and, where necessary, approved by the Commissioner of the Food and Drug Administration (FDA); and (B) if such device, product, drug, or drug delivery system, has, after notice and opportunity for public comment, been approved and determined to be essential by the Commissioner in consultation with the Administrator.

The FDA currently lists 12 medical devices for human use as essential uses of CFCs in 21 CFR 2.125. These devices consist of certain metered dose inhalers (MDIs), contraceptive vaginal foams, intrarectal hydrocortisone acetate, polymyxin B sulfate-bacitracin-zinc-neomycin sulfate soluble antibiotic powder without excipients for topical use, and anesthetic drugs for topical use on accessible mucous membranes where a cannula is used for application.

No medical products as defined above are banned by the provisions of today's rulemaking. Today's regulation specifically exempts medical products contained in the FDA's list of essential uses (21 CFR 2.125), as well as gauze bandage adhesives and adhesive removers, lubricants for pharmaceutical and tablet manufacture, and topical anesthetic and vapocoolant products. Regulation of medical products may be considered at a later date under the conditions in section 610(e) and section 601(8).

I. Notice of Proposed Rulemaking

On January 16, 1992, EPA published a notice of proposed rulemaking (NPRM 57 FR 1992) addressing issues related to the prohibition required by section 610 of the Act on the sale or distribution in interstate commerce of nonessential Class I products.

In developing the proposed rule, EPA was assisted by a subcommittee of the standing Stratospheric Ozone Protection Advisory Committee (STOPAC). The STOPAC consists of members selected on the basis of their professional qualifications and diversity of perspectives and provides balanced representation from the following sectors: industry and business; academic and educational institutions; federal, state and local government agencies; and environmental groups. Since its formation, the STOPAC has provided advice and counsel to the Agency on policy and technical issues related to the protection of the stratospheric ozone layer.

In 1990, members were asked to participate in subgroups of the STOPAC to assist the Agency in developing regulations under the new requirements of title VI of the Clean Air Act, as amended in 1990. To date, the Subcommittee on Nonessential Products has met twice, reviewing two in-depth briefing packets (contained in Docket A–91–39) and offering comments and technical expertise on the January 16 proposed rule.

In its NPRM, EPA proposed definitions for the terms "chlorofluorocarbon," "commercial," "consumer," "distributor," "product," and "release." These proposed definitions would apply only to regulations under section 610. In describing these definitions, EPA discussed the legal and policy aspects of the various options considered. The NPRM also discussed at great length the criteria used to determine whether a product was nonessential under section 610(b)(3). The proposed rule listed the products identified as nonessential by the statute, as well as the products which the Agency proposed to identify as nonessential. The proposed rule called for banning the sale or distribution of the CFC-containing products specifically mentioned in the statute, and, in addition, plastic flexible or packaging foams and all aerosol products except seven uses which were specifically identified. The NPRM also explained EPA's decision to include aerosols and pressurized dispensers containing CFCs, as well as plastic flexible and packaging foams produced with CFCs in the Class I nonessential products ban. Finally, the NPRM requested comments on whether halon fire extinguishers for residential use should be banned as nonessential products.

1. Specified Class I Products

a. *CFC-propelled plastic party streamers.* EPA found only one type of product that fits the description "chlorofluorocarbon-propelled plastic party streamers" as set forth in section 601(b)(1). String confetti is a household novelty product comprised of a plastic resin, a solvent, and a propellant mixed together in a pressurized can. When the dispensing nozzle is depressed, blowing action converts the resin into plastic foam streamers and propels them a few feet. Once popular at children's parties, string confetti was commonly known by its commercial name "silly string."

String confetti was originally manufactured using CFC–12 as the blowing agent. However, EPA is unaware of any company that currently uses CFCs in this type of product. The use of CFC–12 in string confetti was not prohibited by EPA's 1978 aerosol ban because technically the CFC also served as an active ingredient in the product and not exclusively as an aerosol propellant. Manufacturers switched initially to hydrocarbon systems but, due to flammability concerns, have since moved to HCFC–22 systems. HCFC–22 is a Class II substance with an ozone depletion potential of 0.05 (one twentieth that of CFC–12) (see listing

[1] Although the legislative history of section 610 is unclear on this point, the Senate Statement of Managers specifically states that the section 608 ban on the venting of refrigerants, which like the Class II ban is an outright prohibition, is self-executing and will take effect on the stated date even if that date is in advance of EPA regulations implementing the ban. See Congressional Record, page S16948, October 27, 1990.

notice of ozone depleting substances 56 FR 2420; January 22, 1991).

EPA believes that since the excise tax and production limits on CFCs will continue to raise their cost, it is unlikely that they would again be used to propel string confetti. Nonetheless, as required by the statute, the proposed rule called for a prohibition on the sale or distribution of any CFC-propelled plastic party streamers.

b. *CFC-propelled noise horns.* A noise horn is generally regarded as a product from which the high dispensing pressure of a propellant produces a loud piercing sound that can travel long distances. EPA is aware of several products that could fit the description of "noise horns" in section 610(b)(10), including marine safety noise horns, sporting event noise horns, personal safety noise horns, wall-mounted industrial noise horns used as alarms in factories and other work areas, and intruder noise horns used as alarms in homes and cars.

In the past, many boaters used noise horns propelled by CFC–12 to meet U.S. Coast Guard regulations requiring vessels of all sizes to carry a noise-making signalling device. One of the largest manufacturers of such "marine safety" noise horns reported that all of its horn products except for the smallest canister (2.1 ounces) had either been reformulated to use HCFC–22 or dropped from its product line. According to this manufacturer, the reason that CFC–12 is still used in its smallest canister is that the Department of Transportation (DOT) has not yet approved a canister of that size to accommodate the different pressure of HCFC–22.

The use of CFC–12 in noise horns was not prohibited by the 1978 aerosol ban because the CFC served as the sole ingredient in the product and not merely as a propellant. EPA's report Alternative Formulations to Reduce CFC Use in U.S. Exempted and Excluded Aerosol Products (*Alternative Formulations*) states that as of September 1989, "several manufacturers" of noise horns had switched from CFC–12 to HCFC–22. Noise horns propelled with HCFC–22 meet or exceed all Coast Guard requirements and are available in canisters as small as 4.5 ounces. EPA believes that 4.5 ounce canisters are sufficiently small to satisfy consumer needs for all recreational, boating, automotive and home uses, and should not cost significantly more than the currently available 2.1 ounces size that uses CFC–12. Other alternative propellants for noise horns include HCFC–142b (in a mixture with HCFC–22), hydrocarbons, and hydrofluorocarbon (HFC)–134a. Hydrocarbons have not been commonly used due to flammability concerns. HFC–134a appears promising as a non-chlorinated substitute that unlike HCFC–22 poses no threat to the ozone layer. HFC–134a has recently become available in limited commercial quantities. EPA believes that the current and potential availability of effective substitutes (including either the use of a different propellant or a slightly larger canister pending DOT approval of the smallest) indicates Congressional intent to prohibit the sale and distribution of any CFC-propelled noise horns, including those which serve as safety devices.

Other products propelled with CFCs that appear to fit the description "noise horns" in section 610(b)(1) include sporting event noise horns, personal safety noise horns, wall-mounted industrial noise horns used as alarms in factories and other work areas, and intruder noise horns used as alarms in homes and cars. The availability of substitutes for these other noise horn products is similar to that of the marine safety noise horns. In fact, the same noise horn product may perform several of the uses listed above.

As with the party streamers, EPA believes that the excise tax and the limits on supply have raised the prices of CFCs so much that it may already be more economical to use substitutes in noise horns. Nevertheless, in the January 16, 1992 NPRM, EPA proposed to ban all noise horns propelled with CFCs, as required by the statute.

c. *CFC-containing cleaning fluids for noncommercial electronic and photographic equipment.* Cleaning fluids are generally used to remove oxides, contaminants, dust, dirt, oil, airborne chemicals, fingerprints, and fluxes (the waste produced during soldering) from electronic and photographic equipment. These fluids are currently comprised of CFCs, HCFCs, methyl chloroform or alcohols, either alone or in mixtures.

EPA identified several products that it considered to be CFC-containing cleaning fluids for the uses described in section 610(b)(2). These products fall into four broad categories: solvent wipes containing CFC–113 (pre-moistened cloths), liquid packaging containing CFC–113 (applied with a cloth or other applicator), solvent sprays containing CFC–113 and/or CFC–11 (sprayed from a pressurized container through a nozzle or tube), and gas sprays containing CFC–12 (pressurized fluid released as a gas to physically blow particles from a surface). These cleaning fluid products include tape and computer disk head cleaners, electronic circuit and contact cleaners, film and negative cleaners, flux removers, and camera lens and computer keyboard dusters.

EPA believes that the tax and the limits on supply are providing an ever-increasing incentive for users of noncommercial cleaning fluids to switch from products containing CFCs to alternatives. Nevertheless, the January 16, 1992 NPRM proposed to ban the noncommercial use of these products, as required by the statute.

2. Criteria

Section 610 authorizes the Administrator to identify and ban nonessential products in addition to those specifically addressed in the Act. In keeping with Congressional intent, EPA examined products that were not specifically addressed in the statute. Section 610(b)(3) provides that in examining these products, the Administrator consider the purpose or intended use of the product, the technological availability of substitutes for such product and for such Class I substance, safety, health, and other relevant factors. The statute requires EPA to consider each criterion but does not outline either a ranking or a methodology for comparing their relative importance, nor does it require that any minimum standard within each criterion be met. EPA considered all of these criteria in determining whether a product was nonessential. In addition, EPA reviewed the criteria used in the development of its 1978 ban on aerosol propellant uses of CFCs under the Toxic Substances Control Act (TSCA). All of these criteria are discussed below.

a. *Criteria in the 1978 Ban.* The criteria used by EPA to determine which products should be exempted from the 1978 ban as "essential uses" were: (1) "Nonavailability" of alternative products; (2) economic significance of the product, including the economic effects of removing the product from the market; (3) environmental and health significance of the product; and (4) effects on the "quality of life" resulting from no longer having the product available or from using an alternative produce (See Essential Use Determinations—Revised, 1978). These criteria are in many ways comparable to those included in section 610.

The background document supporting the 1978 ban states that when granting "essential use" exemptions, EPA believed that no single factor was sufficient to determine that a product or particular use was essential. The lack of available substitutes alone, for example, was not sufficient for EPA to exempt a

product. The product also had to provide an important societal benefit to obtain an "essential use" exemption. If an alternative did exist, however, EPA decided that this product or use was not "essential," and that it was not necessary to make any judgements concerning the other criteria.

In other words, if EPA determined that an aerosol product had an available alternative, EPA did not need to make a determination on whether its purpose was or was not important in order to deny any petition for exemption for that product under the 1978 rule.

b. *Criteria in the Clean Air Act Amendments of 1990*—1. The Purpose of Intended Use of the Product. EPA interprets this criterion as relating to the importance of the product, specifically whether the product is sufficiently important that the benefits of its continued production outweigh the associated danger from the continued use of a Class I ozone-depleting substance in it, or alternatively, whether the product is so unimportant that even a lack of available substitutes might not prevent the product from being considered nonessential. For example, the statute seems to indicate that the purpose or intended use of medical products is important enough to preclude EPA from banning as nonessential any medical product without an "effective alternative," and that, conversely, party streamers are not important enough to warrant the continued use of CFCs regardless of the availability of substitutes.

However, the other examples of nonessential products cited by Congress for EPA to ban at a minimum do not provide as clear-cut an illustration of this criterion. Noise horns, for example, are primarily used for safety reasons. Nor is the use of cleaning fluids on noncommercial photographic and electronic equipment generally considered to be frivolous. EPA believes that these examples of nonessential products provided by Congress show that while it is critical to consider the purpose or intended use of a product along with the other specified criteria, Congress did not intend to limit EPA's authority to consideration of only the intended use.

A possible corresponding criterion from the 1978 aerosol ban is the effect on the "quality of life" of no longer having the product available or of using an alternative. As discussed above, the product had to provide an important societal benefit for EPA to grant an exemption from the 1978 ban, even if the product did not have an available alternative. Consequently, in the Class I nonessential products ban under section 610(b)(3), EPA considered the contribution to the quality of life of a product using a Class I substance, the impact of compelling a transition to a substitute chemical or process, and the impact of the product's removal from the market altogether, in evaluating this criterion.

The distinction between a "nonessential product" and a "nonessential use of Class I substances in a product" is also relevant to this criterion. While foam cushioning products for beds and furniture are not "frivolous," for example, the use of a Class I substance in the process of manufacturing foam cushioning where substitutes are readily available could be considered nonessential. EPA believes that the extent to which manufacturers of a product have already switched out of Class I substances is a relevant indicator for this criterion. For example, the Agency believes that in sectors where the grant majority of manufacturers had already shifted to substitutes, the use of a Class I substance in that product may very well be nonessential; EPA is also aware that in certain subsectors, the continued use of CFCs, despite the imposition of the excise tax and the impending production phaseout, may indicate failure to meet one or more of the criteria for nonessentiality, such as the technological availability of substitutes. Consequently, EPA carefully examined sectors in which most of the market had switched out of CFCs.

2. The Technological Availability of Substitutes. EPA interprets this criterion to mean the existence and accessibility of alternative products or alternative chemicals for use in, or in place of, products releasing Class I substances. EPA believes that the phrase "technological availability" may include both currently available substitutes (i.e., presently produced and sold in commercial quantities) and potentially available substitutes (i.e., determined to be technologically feasible, environmentally acceptable and economically viable, but not yet produced and sold in commercial quantities). However, EPA considered the current availability of substitutes more compelling than the potential availability of substitutes in determining whether a product was nonessential.

The corresponding criterion from the 1978 ban is the "nonavailability of alternative products." In its supporting documentation, EPA stated that this was the primary criterion for determining if a product has an "essential use" under the 1978 rule. EPA emphasized, however, that the absence of an available alternative did not alone disqualify a product from being banned.

The availability of substitutes is clearly a critical criterion for determining if a product is nonessential. In certain cases, a substitute that is technologically feasible, environmentally acceptable and economically viable, but not yet produced and sold in commercial quantities, may meet this criterion. EPA believes that, where substitutes are readily available, the use of controlled substances could be considered nonessential even in a product that is extremely important.

It should be noted, however, that EPA does not necessarily advocate all substitutes that are currently being used in place of CFCs in the products EPA identifies as nonessential. Some manufacturers have switched from CFCs to substitutes that may have serious health and safety concerns. EPA will be looking carefully at the relative risks and merits of different substitutes for ozone-depleting substances as it implements section 612 (SNAP). On the other hand, EPA wants to reassure the public that the section 610 and the section 612 rulemakings will not, either intentionally or inadvertently, leave manufacturers or consumers without appropriate substances for each essential use.

3. Safety and Health. EPA interprets these two criteria to mean the effects on human health and the environment of the products releasing Class I substances or their substitutes. In evaluating these criteria, EPA considered the direct and indirect effects of product use, and the direct and indirect effects of alternatives, such as ozone-depletion potential, flammability, toxicity, corrosiveness, energy efficiency, ground level air hazards, and other environmental factors.

If any safety or health issues prevented a substitute from being used in a given product, EPA then considered that substitute to be "unavailable" at this time for that specific product or use. As new information becomes available on the health and safety effects of possible substitutes, EPA may re-evaluate determinations made regarding the nonessentiality of products not covered in today's rulemaking or, as stated above, the Agency may take action under section 612.

4. Other Relevant Factors. Section 610(b)(3) does not specify that EPA must consider the economic impact of banning a product, as in the 1978 ban, but the Agency did consider the economic impact of such an action as an "other relevant factor." EPA believes that it has the authority under section

610(b)(3) to consider any relevant factors, including costs, in determining whether products are nonessential.

In considering the immediate economic impact of banning the use of a Class I substance in a product, EPA attempted to compare the cost of the possible substitutes and the cost of the Class I substance, including the effects of the excise tax and the limits on production and importation under the Clean Air Act, when this information was available. EPA believes that in many cases the tax and supply limits have already provided a compelling incentive for manufacturers using Class I substances to switch to substitutes. EPA also considered the available information on manufacturing costs associated with using substitutes or switching to alternative market lines. Finally, EPA attempted to assess the societal costs of eliminating the product altogether where appropriate.

Another relevant factor that EPA considered was the impact of state or local laws prohibiting the use of certain substances commonly used as substitutes for ozone-depleting chemicals. For example, Massachusetts, New Jersey and California all specifically limit the use of methylene chloride, which is used as a CFC-substitute for some flexible foam products. Other areas have limits on the general emissions of volatile organic compounds (VOCs). If the only available substitute for the use of a Class I substance in a product—including both alternative chemicals and product substitutes—was a chemical whose use was prohibited in certain areas, EPA considered substitutes to be unavailable for that product in those areas. As stated above, however, the lack of available substitutes did not automatically disqualify a product from being prohibited as nonessential.

Finally, after publication of the proposed rule, EPA received comments on a number of products not specifically covered in the proposed rule. A number of these products, such as tobacco expanded with CFCs and closed cell polyurethane foam used as a flotation foam, may meet the criteria for designation as nonessential products subject to the Class I nonessential products ban. EPA believes, however, that it would be inappropriate to include new product categories in the ban which were not considered by the proposed rule. Consequently, today's rulemaking covers only products included in the January 16, 1992 proposed rule. EPA has the authority to consider designating as nonessential other products which release ozone-depleting substances in future rulemakings, however, and the Agency may consider such action if at a later date EPA determines that these products satisfy the criteria for nonessentiality.

In evaluating products for inclusion in the Class I nonessential products ban, EPA considered all of the criteria described above. Any one of the criteria outlined above could be the deciding factor in relation to all other factors in determining whether a product was, or was not, covered under the ban.

3. Other Products

In determining which products to prohibit under section 610(b)(3), the Agency considered every major use sector (although not each individual product or brand) of each Class I substance (CFCs, halons, carbon tetrachloride and methyl chloroform), including refrigeration and air conditioning, solvent use, fire extinguishing, foam blowing, and aerosol uses. Based on this review, the Agency identified three broadly defined products for further preliminary evaluation: aerosol products and pressurized dispensers containing CFCs, plastic flexible and packaging foams, and halon fire extinguishers for residential use. EPA then analyzed these three sectors in more detail before preparing the January 16, 1992 NPRM.

EPA had reason to believe that in each of these sectors two important conditions existed: substitutes were already available for the product or the Class I substance used or contained in that product; and, either the affected industry had, for the most part, moved out of the Class I substances or the market share of products using or containing Class I substances was small and shrinking.

In addition, in the case of aerosols and plastic flexible and packaging foams, section 610(d) imposes a self-effectuating ban on the sale or distribution of such products containing or produced with Class II substances after January 1, 1994. The Agency was concerned that failure to ban nonessential products containing or produced with Class I substances in these use sectors would provide an incentive for the affected industries to switch back to the use of Class I substances after that date, resulting in increased damage to the environment.

In the January 16, 1992 NPRM, EPA proposed to ban the sale or distribution of aerosols and pressurized dispensers containing CFCs and plastic flexible and packaging foams manufactured with CFCs. In addition, it requested public comment on the advantages and disadvantages of including residential home fire extinguishers in the ban, but it did not propose including these products in this rulemaking. The reasoning behind EPA's decision is described in greater detail below.

Refrigeration and air-conditioning, including mobile air-conditioning, represent the largest total use of Class I substances in the United States (31.8 percent weighted by ozone-depletion potential in 1987). Substances are available for some refrigeration and air-conditioning products. EPA believes that substitutes for some uses, like refrigerant in motor vehicle air conditioners, are already available, and that the affected industries are switching to these alternatives (the major automobile companies, for example, are introducing new models which use HFC–134a rather than CFC–12 in their air conditioning systems). However, potential substitutes for other refrigeration and air-conditioning uses are still being evaluated. For example, HCFC–123 has been proposed as a replacement for CFC–11, but toxicity testing of HCFC–123 has only recently been completed.

EPA did not include prohibitions on the use of Class I substances in refrigeration or air conditioning in the proposed rule because conclusions on the appropriate substitutes were not anticipated to be available within the time-frame of this rulemaking. Accordingly, EPA could not conclude that any refrigeration or air conditioning uses were nonessential at the time of proposal. The industry continues to investigate chemical substitutes for CFCs in deep freeze applications, as well as substitutes for CFC–114 and CFC–115. EPA plans to specifically address refrigeration and air-conditioning uses of Class I substances under its upcoming section 608 regulations to require the recovery and reuse of refrigerants in these applications.

Solvent uses of Class I substances, including commercial electronics defluxing, precision cleaning, metal cleaning and dry cleaning, also represent a significant use in the U.S. (21.7 percent weighted by ODP in 1987). Industry has identified potentially available substitutes for nearly all of the thousands of products currently manufactured with Class I solvents, and many companies have already phased out the use of CFCs in certain products.

EPA did not address solvent use in the proposed regulations because the sheer number of products and the range of potential substitutes (each with specific technical and health and safety issues) made it impossible for EPA to conclude that substitutes are currently available for any of these specific uses,

and thus that such uses were nonessential, within the short statutory time-frame of this rulemaking. However, the Agency recognizes that the solvent industry is also making significant progress toward the elimination of ozone-depleting chemicals as solvents.

EPA considered the use of Class I substances in fire extinguishing applications in its initial review as well. Halons are widely used in fire extinguishing systems today. These fire extinguishing systems include both total flooding systems (such as stationary fire suppression systems in large computer facilities) and streaming systems (such as hand-held fire extinguishers). In evaluating possible nonessential uses of halons in fire fighting, the Agency divided the fire protection sector into six broad end uses: (1) Residential/Consumer Streaming Agents, (2) Commercial/Industrial Streaming Agents, (3) Military Streaming Agents, (4) Total Flooding Agents for Occupied Areas, (5) Total Flooding Agents for Unoccupied Areas, and (6) Explosion Inertion.

Although halons are extremely effective at fighting fires, they have extremely high ODPs. In fact, although total halon production (measured in metric tons) comprised just 2 percent of the total production of Class I substances in 1986, halons represented 23 percent of the total estimated ozone depletion potential of CFCs and halons combined. Consequently, halons in fire extinguishing equipment represent a significant use sector in terms of ozone depleting potential, and the Agency has worked closely with industry and the military to minimize halon emissions and encourage a rapid transition to acceptable substitutes. Halon recycling and banking is instrumental in reducing halon emissions and will extend the availability of these chemicals past the phaseout.

The fire protection community has made considerable progress in adopting alternatives to halons in fire protection applications. Most recent efforts to develop substitutes for halon have focused primarily on halocarbon chemicals, but several "alternative" agents such as water, carbon dioxide, foam, and dry chemical are already in widespread use as fire extinguishants and can be expected to find use as substitutes for halons in many applications.

Substitutes for halons, whether other halocarbons or alternatives such as water, should meet four general criteria to provide a basis for determining that the use of halon in residential fire extinguishers is nonessential. They must be effective fire protection agents, they must have an acceptable environmental impact, they must have a low toxicity, and they must be relatively clean or volatile. In addition, they must be commercially available as a halon replacement in the near future.

The excise tax on halons is scheduled to rise from $0.25 per pound to $13.05 per pound for halon 1211 and $43.50 per pound for halon 1301 in 1994. EPA anticipates that this dramatic increase in the price of halons will provide a significant economic incentive for consumers to shift from halons to available substitutes, and for producers to develop halon substitutes and substitute products.

After its initial review of this use sector, EPA concluded that while satisfactory substitutes were not yet available in most commercial and military applications within the short statutory time-frame of this rulemaking, certain substitutes were already commercially available for hand-held halon fire extinguishers in residential settings. Consequently, the Agency decided to evaluate this application more closely in order to determine whether residential fire extinguishers containing halon should be designated nonessential products, or whether the continued use of halons, despite the imposition of the excise tax and the impending production phaseout, indicated that this application did not meet the criteria for nonessentiality. With this end in mind, the proposed rule requested comments on whether these products met the criteria for nonessentiality as well as whether, due to the excise tax on ozone-depleting substances, banning these products would be unnecessary in order to effectuate the statutory goal of removing such products from interstate commerce.

EPA considered aerosols and pressurized dispensers likely candidates for designation as nonessential products because a great deal of information on substitutes for CFCs in these applications already existed. Research on substitutes for CFCs in aerosol applications began in the 1970s in response to the early studies on stratospheric ozone depletion and the 1978 ban on the use of CFCs as aerosol propellants. Consequently, extensive data already existed on possible substitutes for most remaining aerosol uses. EPA's evaluation concentrated on products which had been exempted or excluded from the 1978 ban on CFC propellants because these products were the only remaining legal applications of CFCs in this use sector.

The 1978 aerosol ban prohibited the manufacture of aerosol products using CFCs as propellants. Other uses of CFCs in aerosols (such as solvents, active ingredients, or sole ingredients) were not included in the ban. In addition, certain "essential uses" of CFCs as aerosol propellants were exempted from the ban because no adequate substitutes were available at the time. Consequently, although the use of CFCs in aerosols was reduced dramatically by the 1978 ban, the production of a number of specific aerosol products containing CFCs is still legal. These products include: metered dose inhalant drugs; contraceptive vaginal foam; lubricants for the production of pharmaceutical tablets; medical solvents such as bandage adhesives and adhesive removers; skin chillers for medical purposes; aerosol tire inflators; mold release agents; lubricants, coatings, and cleaning fluids for industrial/institutional applications to electronic or electrical equipment; special-use pesticides; aerosols for the maintenance and operation of aircraft; aerosols necessary for the military preparedness of the United States of America; diamond grit spray; single-ingredient dusters and freeze sprays; noise horns; mercaptan stench warning devices; pressurized drain openers; aerosol polyurethane foam dispensers; and whipped topping stabilizers. After examining the available information (see Background Document on Identification of Nonessential Products that Release Class I Substances and Alternative Formulations in Docket), EPA concluded that satisfactory substitutes were available for most uses of CFCs in aerosols and pressurized dispensers. As a result, the Agency proposed banning all uses of CFCs in aerosols and pressurized dispensers except for certain products, such as medical devices, that it specifically exempted.

EPA examined the use of Class I substances in foam products, relying heavily on the research conducted for the 1991 United Nations Environment Programme (UNEP) technical options report on foams (see Technical Options Report). The UNEP report divided polyurethane foam into three major categories: rigid foam, flexible foam, and integral skin foam. It further subdivided rigid polyurethane foams into functional categories: open cell packaging foam and closed cell insulating foam. EPA used the same categories in the section 610 rulemaking. Based on this research, the Agency proposed prohibiting the use of CFCs in flexible and packaging foams in the NPRM. The Agency focused on these foam sectors due to the clear availability of substitutes such as

water-blown foam, reformulated foams, and alternative chemicals such as HCFC–22 and methylene chloride. EPA did not propose to prohibit the use of CFCs in insulating foam, expanded polystyrene foam, polyvinyl chloride foam, or integral skin foam. The reasons for this decision are described below.

EPA did not propose the inclusion of insulating foams manufactured with CFCs in the Class I nonessential products ban. Although flexible and packaging foams have currently available substitutes, the UNEP technical options report estimated that the elimination of CFCs in insulating foams would not be technical feasible until 1995 in developed countries. Rigid insulating foams using CFCs were exempt from the excise tax in 1990, and they are subject to a reduced tax until 1994. The required ban on the use of Class II substances in foam products in section 610(d) also specifically exempts insulating foams. As a result, EPA proposed banning only flexible and packaging foams in the NPRM. The Agency intends to address insulating foams under the section 612 rulemaking.

While polyvinyl chloride foam and expanded polystyrene foam could be considered flexible and packaging foams, EPA did not propose banning products made with expanded polystyrene foam or polyvinyl chloride foam in the NPRM because the 1991 UNEP report indicates that CFCs were never used in the production of either expanded polystyrene or polyvinyl chloride foams. As a result, EPA believes that it is unnecessary to formally prohibit the use of CFCs in these products, and the Agency did not include them in the proposed Class I nonessential products ban. However, EPA reserves the right to take action in the future under this section to prohibit as nonessential the use of CFCs in these products should it appear appropriate.

EPA also considered including integral skin foam in the Class I nonessential products ban. The UNEP report treated polyurethane integral skin foam as a separate category distinct from rigid insulating, rigid packaging, and flexible foams. In preparing the proposed rule, EPA utilized the same categories as the 1991 UNEP technical options report on foams. Consequently, EPA does not consider integral skin foam to be a "flexible or packaging foam." Integral skin foam is used in a number of applications, including motor vehicle safety applications, as suggested by section 610(d)(3)(B). EPA was not able to conclusively determine in the time available that adequate substitutes for integral skin foam, or for the use of CFCs in the production of integral skin foam, were available. As a result, EPA did not include them in the proposed Class I nonessential products ban. However, EPA must address integral skin foams in its rulemaking for the Class II nonessential products ban. Section 610(d)(2)(B) exempts integral skin, rigid, or semi-rigid foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards where no adequate substitute substance (other than a Class I or Class II substance) is practicable for effectively meeting such Standards from the nonessential products ban on foams containing, or manufactured with, Class II substances. The Agency reserves the right to take action under section 610 to prohibit the use of CFCs in integral skin foams at that time, or some other future time, if necessary.

EPA did not propose banning any products releasing the other Class I substances (halons, carbon tetrachloride and methyl chloroform) in the NPRM, although it requested comments on the need to ban halon fire extinguishers for residential use (for a discussion of halons, see the preceding discussion in this section, as well as section III.B.5. in today's preamble). EPA estimates that in the United States today, most carbon tetrachloride is consumed in the production of CFCs. The nonessential products ban is directed at specific end uses, not feedstocks, and therefore, the Agency has decided not to take action on this chemical under section 610. Methyl chloroform, also a Class I chemical, is widely used as a solvent for metal cleaning, in adhesives and coatings, and in aerosols. Methyl chloroform is used in thousands of different products. EPA believes that substitutes are available for many of the current uses of methyl chloroform, but these substitutes could not be thoroughly evaluated within the time constraints established in the Act. Consequently, EPA could not conclude that any such uses were nonessential. Thus, EPA's proposed rule did not cover many use sectors or products which use methyl chloroform. Nevertheless, EPA has reason to believe that substitutes exist for a number of these applications, and many of these uses of methyl chloroform may be addressed in the Agency's section 612 rulemaking.

EPA will further analyze the sectors described above on which it has insufficient information at this time and may take further regulatory action to ban uses in such sectors as appropriate once the agency obtains sufficient data.

EPA selected the product sectors identified in today's notice for the following reasons. First, EPA believes that they all clearly fit the criteria specified by section 610(b)(3) based upon information and analysis the Agency already had or could obtain within the tight regulatory time-frame required by the statute. In fact, all the identified products are relatively well-defined, have commercially available alternatives, and have been the subject of prior federal or state-level rulemakings or voluntary agreements to limit the use of ozone-depleting substances.

EPA also took into consideration the prohibition required by section 610(d) on certain products releasing Class II substances, which goes into effect in 1994. EPA is concerned that banning the use of Class II substances in certain products in 1994, while permitting the use of the more harmful Class I substances in the same products, could provide an environmentally harmful incentive that encourages the use of Class I substances over Class II substances. Thus, the statutory prohibition in section 610(d) provided further direction in choosing products on which to focus at this time under section 610.

As a result of this process, the NPRM proposed prohibiting the sale and distribution of flexible and packaging foam using CFCs and aerosols and other pressurized dispensers containing CFCs. Below, EPA defines these product categories and then presents an overview of how each one meets the criteria specified by section 610(b)(3) and discussed above in section I.I.1. More detailed analyses of the "other" products to be prohibited are provided in the background documents accompanying this rulemaking (see Docket A–91–39).

a. Flexible and packaging foam using CFCs. CFCs have been widely used in the production of a variety of foam plastics. CFC–11, –12, –113, and –114 have all been used as blowing agents in the manufacture of foam products such as building and appliance insulation, cushioning products, packaging materials, and flotation devices. According to the 1991 UNEP Flexible and Rigid Foams Technical Options Report, the foam plastics industry used approximately 174,000 metric tons of CFCs worldwide in 1990, a 35 percent drop from the industry's estimated CFC consumption in 1986. The UNEP report also estimates that, of the CFCs consumed by the foam plastics industry, approximately 80 percent were used in building and appliance insulation while the remaining 20 percent found use as blowing agents in applications such as packaging, cushioning and flotation. In the United States, CFC use in many

foam types has decreased dramatically since 1986. In some applications, especially in flexible and packaging foams, most manufacturers have already phased out the use of CFCs completely.

CFCs have been widely used as blowing agents in the manufacturing process of many foam products because they possess suitable boiling points and vapor pressures, low toxicity, and very low thermal conductivity; in addition, they are non-flammable, non-reactive, and, until the introduction of the excise tax and production limits, cost-effective. The excise tax levied by Congress in 1989 significantly raised the price of CFCs (except for use in the manufacture of rigid insulating foam, which was exempt from the tax in 1990 and is subject to a greatly reduced tax of approximately $0.25 per pound until 1994), and as a result, foam manufacturers have switched to non-CFC substitutes in many areas.

Even before the tax went into effect, several groups of foam manufacturers, including the Foodservice and Packaging Industry and the Polyurethane Foam Association, made significant voluntary efforts in cooperation with the Agency and several environmental groups to eliminate or reduce the use of CFCs in their products ahead of the required phaseout timetable. In addition, one industry group has worked with the Agency to develop and make available an in-depth description of technical options to achieve these reductions (see Handbook for Eliminating and Reducing Chlorofluorocarbons in Flexible Foams). Among the many commonly used substitutes for CFCs in flexible and packaging foam are HCFCs, hydrocarbons and methylene chloride (See below for further discussion of these substitutes).

The 1991 UNEP technical options report provides information on potential substitutes for the entire foam industry by foam type. Each type of foam has a distinct set of product and process application needs; for example, an important distinction exists between foam plastics where the cells are closed, trapping the blowing agent inside, and those with open cells which release the blowing agent during the manufacturing process.

For the purposes of today's rulemaking, EPA identifies the following categories as "flexible and packaging foam:" Polyurethane flexible slabstock and molded foams, open cell rigid polyurethane packaging foam, polyethylene foam, polypropylene foam, and extruded polystyrene sheet foams. The included polyurethane foams are open cell thermosetting foams, where the blowing agent is mixed with chemicals which react to form the plastic. The other included foams are closed cell thermoplastic foams, where the blowing agent is injected into a molten plastic resin which hardens upon cooling.

EPA first suggested the possibility of banning flexible and packaging foams in its December 14, 1987 Proposed Rule (52 FR 47489) and again in its August 12, 1988 Advanced Notice of Proposed Rulemaking (53 FR 30604). Of the foam types identified as "flexible and packaging," EPA believes that the producers of polyurethane flexible molded foam, open cell rigid polyurethane poured foam, polyethylene foam, polypropylene foam and extruded polystyrene sheet foam have already eliminated the use of CFCs. EPA also believes that CFC emissions from the manufacture of flexible polyurethane slabstock foam can be reduced to zero because manufacturers have largely converted from CFCs to readily available substitutes and are currently exploring alternative technologies.

EPA proposed prohibiting the sale and distribution of flexible and packaging foams using CFCs in the January 16, 1992 NPRM primarily because CFC use has already largely stopped in these foam types following voluntary efforts and the imposition of the excise tax. In addition, the Agency believes that if CFCs are not prohibited in flexible and packaging foams, the self-effectuating 1994 ban on noninsulating foam products made with or containing Class II substances could set up an environmentally harmful incentive for foam manufacturers who have not switched out of CFCs to continue to use them, or for those using HCFCs to switch back to CFCs.

In making its determination that flexible and packaging foams are nonessential, EPA examined their purpose and intended use. Flexible and packaging foams are used in furniture and upholstery, transport and protective packaging, cushioning, protective wrap, food containers, and flotation devices. EPA does no consider the purposes of flexible and packaging foams "frivolous."

EPA determined, however, that adequate substitutes for CFCs in the production of flexible and packaging foams were indeed available. Substitute options currently being used in flexible and packaging foams vary depending on the foam type in question. Options for flexible polyurethane slabstock foam production include increased foam density or the use of more water in the production process, as well as the substitution of acetone, HCFCs, methyl chloroform, and methylene chloride. Other near-term alternatives available to eliminate CFCs in flexible polyurethane slabstock foam include new polyol technology which increases softness with little or no CFC use and "AB" technology which uses formic acid to double the quantity of gas generated in the reaction of isocyanate with water. Alternatives for the production of other flexible and packaging foams include hydrocarbons, carbon dioxide, or HCFCs. EPA believes that the fact that the great majority of manufacturers of these products have already switched our of CFCs to commercially available substitutes indicates that the use of CFCs in this product area is nonessential.

There are a number of safety and health issues associated with the possible substitutes for CFCs in the production of plastic flexible and packaging foams; however, EPA believes that with the proper precautions, each of these alternatives can be used safely.

Methylene chloride is classified by EPA as a B2 (probable human) carcinogen with an Occupational Safety and Health Administration Permissible Exposure Limit (OSHA PEL) of 25 parts per million. Appropriate worker health and safety practices must be followed by flexible foam manufactures in those states that allow the use of this chemical.

Hydrocarbons and acetone are flammable. Manufacturers must take special safety precautions, including appropriate ventilation, when using these substances. Hydrocarbons and acetone are also volatile organic compounds (VOCs) which can contribute to the formation of ground-level air pollution. States must consider VOC emissions in meeting requirements of State Implementation Plans (SIPs) to attain the ground-level ozone National Ambient Air Quality Standards (NAAQS).

HCFCs (particularly-141b) and methyl chloroform, although they have much less effect on stratospheric ozone than do CFCs, have measurable ozone-depletion potentials (see listing notice 56 FR 2420; January 22, 1991). In addition, these substances may be regulated elsewhere in title VI (sections 604, 605, 606, 608, 609, 611, 612, and 613).

The formic acid used in AB technology creates carbon monoxide and has a Ph of 3, so it too requires special care in handling.

EPA believes that none of the health and safety issues described above should preclude the prohibition of CFC use in flexible and packaging foams

under section 610. Each technology presents its own associated set of hazards, including the use of CFCs. The Agency believes, however, that if the proper precautionary steps are taken, these alternatives can be used safely. EPA does not necessarily endorse all of the substitutes currently being used by manufacturers in place of CFCs and intends to carefully examine the issue of safe alternatives under section 612.

In making its determination to classify flexible and packaging foams as nonessential, EPA also considered several other relevant factors. As noted earlier, the majority of flexible and packaging foam manufacturers have already phased out the use of CFCs. The excise tax and the phaseout of CFR production provide significant incentives for those manufacturers still using CFCs to switch to substitutes. In addition, the accelerated phaseout should provide manufacturers with an additional incentive to move out of the use of Class I substances as rapidly as possible. As a result, EPA anticipates that the future economic impact from today's rulemaking will be minimal, even for small businesses (see Background Document).

Finally, EPA recognizes that some states limit the use of methylene chloride. Flexible foam manufacturers still using CFCs in these areas would be unable to use this particular substitute in the production of super-soft and low-density flexible foams. EPA recognizes, however, that several substitute options apart from methylene chloride (e.g., modified polyols and water-blown foam) are currently in use or will be available in the near future as substitutes for these foam types (production of flexible slabstock foam is discussed in greater detail in section III.B.2.b.). Therefore, EPA proposed banning the use of CFCs in areas where methylene chloride use is restricted, as well as in areas where it is not.

b. *Aerosols and other pressurized dispensers containing CFCs.* In the past, CFCs have been used extensively in aerosol products worldwide, mainly as propellants, but also as solvents and diluents, and as the active ingredients in some products. In the mid-1970s the use of CFC–11 and –12 in aerosols accounted for 60 percent of the total use of these chemicals worldwide. Due to mandatory and voluntary reduction programs in several countries, including the 1978 ban in the United States, this use has been significantly reduced. However, in 1986, aerosol use was still substantial, accounting for 300,000 metric tons, representing 27 percent of the global use of CFCs. In the United States, 9870 metric tons were used in aerosols exempted or excluded from the 1978 ban, representing approximately 2.5 percent of all Class I substances (weighted by ozone-depletion potential) in 1988.

In the January 16, 1992 NPRM, EPA defined "aerosols and other pressurized dispensers containing CFCs" to include both propellant and non-propellant uses of CFCs. Propellant uses of CFCs were banned by EPA in 1978, except for essential uses. Non-propellant uses of CFCs, such as solvent use, were excluded from the 1978 ban. EPA has re-examined all of the products excluded from the 1978 ban, as well as those specifically exempted from the 1978 ban. EPA has also examined products identified by commenters to the proposed rule. As EPA stated in its August 12, 1988 Advanced Notice of Proposed Rulemaking (53 FR 30604), several alternative propellants and delivery systems have been developed since the original aerosol exemptions were granted. In addition, many previously exempted or excluded products no longer use CFCs (see Alternative Formulations).

EPA proposed banning CFCs in aerosols and other pressurized dispensers primarily because a variety of substitutes for CFCs are now widely available and currently in use. In addition, the Agency believes that it is important to ban the use of CFCs in aerosols and pressurized dispensers due to the ban on the use of Class II substances in such products under section 610(d).

Section 610(d) bans the sale, distribution, or offer of sale or distribution in interstate commerce of aerosols or pressurized dispensers containing a Class II substance effective January 1, 1994. EPA believes that if the aerosols and other pressurized dispensers containing CFCs are not included in the Class I nonessential products ban, the ban on aerosols and pressurized dispensers containing Class II substances in 1994 could set up an environmentally harmful incentive for manufacturers who have not switched out of CFCs to continue to use them, or for those using HCFCs to switch back to CFCs. Because the ozone depletion potentials of CFCs are so much greater than those of HCFCs, the continued use of CFCs in this application would have a significant adverse impact on the environment.

In making its determination that the use of CFCs in aerosols and pressurized containers was nonessential, EPA looked at the purpose or intended use of these products. CFCs have been used in aerosol products and other pressurized dispenser products as propellants, solvents, diluents, and active ingredients. Those uses exempted or excluded from the 1978 ban included: metered dose inhalant drugs; contraceptive vaginal foam; lubricants for the production of pharmaceutical tablets; medical solvents such as bandage adhesives and adhesive removers; skin chillers for medical purposes; aerosol tire inflators; mold release agents; lubricants, coatings, and cleaning fluids for industrial/institutional applications to electronic or electrical equipment; special-use pesticides; aerosols for the maintenance and operation of aircraft; aerosols necessary for the military preparedness of the United States of America (primarily pesticides, aircraft and electronics maintenance products, and specialty lubricants); diamond grit spray; single ingredient dusters and freeze sprays; noise horns; mercaptan stench warning devices; pressurized drain openers; aerosol polyurethane foam dispensers; and whipped topping stabilizers. EPA believes that the purposes of these aerosols and pressurized dispensers are generally not "frivolous."

However, EPA determined that adequate substitutes for CFCs in the production of most aerosol products and pressurized dispensers were indeed available. EPA believes that the fact that the great majority of manufacturers of these products have switched out of CFCs (see Background Document) indicates that the use of CFCs in this product area is nonessential.

Currently available substitutes for aerosols and other pressurized dispensers include: hydrocarbons (predominantly propane and butane); other higher priced/special use flammable gases (dimethyl ether, HCFC–142b, and HFC–152a); nonflammable compressed gases (such as carbon dioxide, nitrogen oxide, and HCFC–22, alone or in mixtures); solvent substitutes (methylene chloride and dimethyl ether/water mixtures); non-aerosol spray dispensers (finger pumps, trigger pumps, and mechanical pressure dispensers); and non-spray dispensers (solid sticks, roll-ons, brushes, pads, shakers, and powders). Potentially available substitutes for propellant and solvent uses of CFCs in aerosols and other pressurized dispensers include HCFCs–123, –124, –141b, 142b, and HFC–134a.

In evaluating possible substitutes for CFCs in aerosols and other pressurized dispensers, EPA relied heavily on existing Agency research due to the short statutory timeframe for this rulemaking, especially its 1989 report Alternative Formulations to Reduce CFC

Use in U.S. Exempted and Excluded Aerosol Products. The UNEP Technical Options Committee report on aerosols, sterilants and miscellaneous uses of CFCs also provided valuable information on possible substitutes for CFCs in these applications (see Aerosols). In addition, many commenters requesting exemptions for specific products provided information on possible substitutes, as did several commenters opposed to exemptions for specific products.

EPA believes that manufacturers have been working to identify substitutes for CFCs in all of their product areas. However, there are several products for which EPA has not identified satisfactory substitutes, and which, in its January 16, 1992 NPRM, EPA proposed to exclude from the ban on aerosols and other pressurized dispensers containing CFCs. These products are: contraceptive vaginal foams; lubricants for pharmaceutical and tablet manufacture; metered dose inhalation devices; gauze bandage adhesives and adhesive removers; commercial products using CFC–11 or CFC–113, but no other CFCs, as lubricants, coatings and cleaners for electrical or electronic equipment; commercial products using CFC–11 or CFC–113, but no other CFCs, as lubricants, coatings and cleaners for aircraft maintenance uses; and commercial products using CFC–11 and CFC–113 as release agents for molds used in the production of plastic and elastomeric materials. In addition, EPA received information during the public comment period about the lack of available substitutes for certain products of which the Agency had previously been unaware, such as red pepper safety sprays and document preservation sprays. EPA considered requests for exemptions for these products while preparing the final rule, and on the basis of this information excluded certain additional aerospace applications of CFCs from coverage in today's rulemaking (for additional information on the products mentioned above, see Alternative Formulations and Background Document).

There are a number of safety and health issues associated with the possible substitutes for CFCs in the production of aerosol products and other pressurized dispensers; however, EPA believes that with the proper precautions these alternatives can be used safely.

Hydrocarbons are flammable. Manufacturers and consumers must take special safety precautions, including appropriate ventilation, when using these substances. Hydrocarbons are also volatile organic compounds (VOC)s which can contribute to the formation of ground-level air pollution. States must consider VOC emissions in meeting the requirements of State Implementation Plans to attain the ground-level ozone National Ambient Air Quality Standards.

HCFCs (particularly -141b) and methyl chloroform, although they have much less effect on stratospheric ozone than CFCs, do have measurable ozone-depletion potentials (see listing notice 56 FR 2420; January 22, 1991). In addition, these substances may be regulated elsewhere in title VI (sections 604, 605, 606, 608, 609, 611, 612, and 613).

Methylene chloride is classified by EPA as a B2 (probable human) carcinogen, with an Occupational Safety and Health Administration Permissible Exposure Limit (OSHA PEL) of 25 parts per million. Appropriate worker health and safety practices must be followed by aerosol and pressurized dispenser manufacturers in those states that allow the use of this chemical.

EPA believes that none of the health and safety issues described above are persuasive enough to preclude the identification of CFC-use in aerosols and other pressurized dispensers as a nonessential product under the requirements of section 610. However, EPA does not necessarily advocate all substitutes currently being used by manufacturers in place of CFCs. EPA intends to carefully examine the issue of safe alternatives under regulations to implement section 612.

In making its determination to classify aerosols and other pressurized dispensers as nonessential, EPA also considered several other relevant factors. First, most propellant uses of CFCs have been banned already under the Toxic Substances Control Act (TSCA) since 1978. Today, aerosols and pressurized dispensers containing CFCs make up only a small percentage of existing aerosol products; consequently, EPA estimates that the economic impact of banning CFC use in these applications will be minimal (see Background Document). Second, the excise tax provides an ever-increasing economic incentive for manufacturers of aerosol and pressurized dispenser products which were exempted or excluded from the 1978 ban to switch to substitutes. In addition, the accelerated phaseout of CFC production will force most manufacturers to convert to substitutes as quickly as possible. As a result, EPA anticipates minimal future economic impact from banning aerosols and other pressurized dispensers containing CFCs under section 610.

4. Recordkeeping Requirements

In the NPRM, EPA proposed recordkeeping requirements to monitor compliance with the ban on the sale or distribution of chlorofluorocarbon-containing cleaning fluids for noncommercial electronic and photographic equipment. Recordkeeping was one of four options considered by EPA for restricting the sale of these products to commercial users. These options were described in the January 16, 1992 NPRM.

The first option would have required that CFC-containing cleaning fluids be sold in bulk. However, EPA recognized that some commercial users needed only small quantities of these products, and that the bulk sales requirement would impose a significant burden on such entities. Moreover, this restriction would raise the cost of these products for noncommercial users, but it would not prevent noncommercial users from purchasing them.

The second option EPA proposed was to prohibit the sale of CFC-containing cleaning fluids by outlets which primarily serve noncommercial users. However, as with the first option, this restriction would not prevent noncommercial users from purchasing these products. In addition, it would be a burden on commercial users who purchase these products at retail outlets. Moreover, it would be difficult to adequately define retail stores that are predominantly oriented to noncommercial users.

The third option EPA proposed would have required that stores post notices stating that the sale of these products to noncommercial users was prohibited; alternatively, EPA considered requiring warning labels on containers of these cleaning fluids indicating that they were intended for commercial use only. EPA did not include either of these provisions in the proposed regulatory language because neither of these alternatives by itself would have promoted effective EPA enforcement of the ban on the sale of these cleaning fluids to noncommercial users. In addition, the EPA was concerned that the labeling requirement would be costly and unnecessarily burdensome, given that such products are already also subject to section 611 of the Act. Section 611 requires warning labels on containers of Class I or Class II substances and products containing or manufactured with Class I substances. Consequently, in its NPRM, EPA opted for the fourth, more restrictive option presented, which proposed recordkeeping requirements, because this was the only option considered

which EPA believed would allow the Agency to effectively enforce the prohibition on the sale of these products to noncommercial users.

The NPRM discussed two potential recordkeeping regimes, one requiring annual records of sales to commercial users and one which was transaction-specific. In each case, sellers would require purchasers to provide identifying information, as well as a commercial identification number, in order to verify that the products were being purchased for commercial use; consumers without commercial identification numbers would be unable to purchase CFC-containing cleaning fluids. Commercial identification numbers were defined in the proposed rule as federal employer identification numbers, state sales tax exemption numbers, or local business license numbers. In a transaction-specific system, distributors would be required to record the purchaser's identifying information, transaction dates, and the quantities of cleaning fluids which were purchased; in addition, distributors would be required to maintain records of their own purchases of these products. In this way, EPA could compare distributors' sales and purchases of these products to ensure compliance. Under an annual recordkeeping system, distributors would be required to maintain records of commercial purchasers but not of individual transactions. As a result, EPA would be unable to verify through annual recordkeeping that a distributor had sold these products exclusively to commercial users. EPA proposed a transaction-specific recordkeeping requirement in the proposed rule, but it requested comment on the advantages and disadvantages of annual and transaction-specific recordkeeping requirements in the preamble.

In connection with the exemptions from the 1978 ban, EPA imposed reporting requirements under 40 CFR 712.4 for those products which used a CFC propellant. These reporting requirements expired in 1982. Since that time, the 1978 ban has functioned effectively without specific reporting requirements concerning the commercial uses of these substances. EPA believes that, as a result of the 1978 ban, noncommercial use of CFC-containing aerosol lubricants, coatings, aircraft maintenance products and mold release agents is currently negligible. Therefore, EPA did not propose recordkeeping requirements in these areas.

II. Summary of Comments

A public hearing on the proposed rule was held on January 31, 1992. Six groups presented oral comments on the proposed requirements, and five of them submitted written comments to the Agency as well. A transcript of the hearing is contained in the public docket (see Docket).

The Agency received a total of 190 comments on the proposed rule (see Docket). Many commenters expressed support for the proposed rule, and some suggested expanding the types of products covered. Other commenters criticized the scope of the rule, the criteria for determining whether products are nonessential, and the citation of section 608 as additional authority for restricting the use of Class I substances. A number of commenters made suggestions regarding record-keeping requirements, and several requested clarification of the definition of "interstate commerce." Finally, a number of commenters objected to the possible inclusion of a number of products in the ban, such as self-pressurized containers, medical devices, and residential halon fire extinguishers.

III. Responses to Major Public Comments

A document summarizing the public comments to this rulemaking and responding fully to all significant comments is available in the public docket for this final rule (see Response to Comments for Proposed Rule on Nonessential Products Made with Class I Substances). The major issues raised by the commenters and the Agency's responses to them are described below.

A. Scope and Specific Provisions of Nonessential Rule

1. Support for the Proposed Rule

A number of commenters expressed their support for the proposed rule. One commenter, an industry group, supported the proposed rule in its treatment of available substitutes, consideration of other relevant factors, and the selection of other products. Another industry group supported the Agency's general approach and actions in proposing to ban the products listed in the NPRM. Many commenters wrote to urge EPA to ban the sale or distribution of all nonessential Class I and Class II substances as soon as possible.

2. Scope of Regulation

Several commenters expressed the opinion that the scope of the proposed rule was too great. In several sections of the regulations, EPA used the language "including but not limited to" in describing the products subject to the nonessential products ban. See sections 82.66 (a), (b), (c), and (d). Several commenters indicated that this language was not sufficiently specific to describe the products subject to the ban, especially in light of detailed descriptions of certain subcategories that followed such language in those sections. These commenters suggested that the phrase be deleted and that only specifically listed product subtypes be subject to the ban.

EPA believes that it is appropriate to use the phrase "including but not limited to" in describing the products subject to the ban. Section 610 clearly gives EPA the authority to ban all products within a certain category, such as cleaning fluids for electronic and photographic equipment. EPA could have simply listed the overall product categories in the rule. It is true that the rules must clearly identify those products subject to the ban, and that the descriptions cannot be overly vague. However, EPA does not believe that there is anything vague about the descriptions used in the rule. EPA believes that they are all terms with clear meaning in the industries affected and that any manufacturers or distributors will know if they are handling a product that falls within the ban.

The fact that EPA specifically listed certain subcategories of the larger product categories subject to the ban does not in any way render the overall product category descriptions vague or unclear. EPA concluded that it would be helpful to manufacturers and distributors to specifically list as many product subcategories as the Agency could identify in the rule to aid the public in identifying products subject to the ban. EPA attempted to be comprehensive in this listing, but could not be sure that it had identified all product subtypes within the overall product categories. The "including but not limited to" language is included in the final rule to clarify that all products within the stated product categories are subject to the ban on sale of nonessential products.

Several commenters stated that the Agency does not have the authority under the Act to ban the use of CFCs in aerosols. However, it is clear from the language of section 610 that EPA is authorized to examine all products which result in the release of Class I substances into the atmosphere for the purpose of determining whether they are nonessential. Under section 610(b)(3), the Administrator has the authority to restrict the use of Class I

substances in products that Congress did not specifically cite. Congress provided the Agency with criteria to determine whether a Class I product should be banned (discussed at length in section III.A.5.), and EPA has acted within these parameters in considering products for their eligibility for the nonessential products ban. The fact that CFC use in aerosols is regulated by the 1978 ban does not affect EPA's authority to regulate any aerosol uses exempted or excluded from that ban under section 610.

One commenter felt that the broadening of section 610 was not justified in light of the President's plan to accelerate the phaseout of ozone-depleting chemicals. The commenter observed that the accelerated phaseout would eliminate the production of CFCs by the end of 1995, only a short time after the nonessential products ban takes effect. The commenter questioned whether the environmental benefits of the ban during the period would justify the burden associated with expanding its scope. As stated in section I.G. of this preamble, EPA agrees with the commenter for the most part. Consequently, EPA has limited the scope of today's rule to the product categories affected by the Class II ban and those CFC-containing products specifically listed in the statute. While EPA believes that accelerated phaseout dates will do much to protect the stratospheric ozone layer, the Agency is still required to promulgate regulations to ban those uses of ozone-depleting chemicals it determines are nonessential. EPA believes that there is still a compelling argument for banning the use of CFCs in aerosol products and plastic flexible and packaging foams (see section I.G. of today's preamble). The primary reason for prohibiting the use of CFCs in these sectors is to force them to move to alternatives other than CFCs and HCFCs prior to January 1, 1994, when the Class II nonessential products ban takes effect.

One commenter suggested that the scope of the proposed rule was too narrow, and that other use sectors, such as solvents and methyl chloroform, should be included. This commenter cited examples in which manufacturers had phased out the Class I substances in various use sectors to justify expanding the scope of the rule. EPA is aware that substitutes exist for certain solvent applications of CFCs and particular uses of methyl chloroform. However, EPA could not properly evaluate the tremendous number of products manufactured with methyl chloroform within the short statutory time-frame of this rulemaking. The Agency also felt that it could not address CFC solvent uses adequately in this section 610 rulemaking, since they also find use in large numbers of applications. The Agency believes that the Class I substances and use sectors not addressed in this rulemaking can be addressed more effectively under sections 608 or 612. Finally, given the number of applications to be considered, and given EPA's preferred approach of addressing products and applications by use category rather than individually, the Agency feels it would be impractical and inconsistent to ban products based exclusively on the example of individual users.

One commenter was concerned that there may be some confusion over the use of nonessential products and the sales prohibition. The commenter suggested that EPA confirm that nonessential products purchased before the effective date may still be used, and that the Agency is not regulating the use of nonessential products, merely their sale and distribution. The Agency agrees with the commenter that section 610 of the Act does not address the use of products which are determined to be nonessential. The use of nonessential products purchased prior to the effective dates for the nonessential products ban is not subject to any restriction in this regulation, although other laws and regulations regarding the release of ozone-depleting substances may apply to such use.

3. President's Moratorium on Regulation

Two commenters questioned whether the nonessential products rule would be subject to President Bush's rulemaking moratorium. The President's directive does not allow for certain categories of regulations to be promulgated without delay. Specifically, government agencies have been directed not to postpone any regulation that is subject to a statutory or judicial deadline which falls during the period of the moratorium. Since section 610 contains a statutory deadline for the publication of the final rule, as well as an effective date of November 15, 1992, the nonessential rule is exempt from the regulatory moratorium.

4. Section 608 and EPA Authority

One commenter objected to the citation of the Lowest Achievable Emission Level (LAEL) standards in section 608 as a basis for restricting the emissions of ozone depleting substances. According to the commenter, Congress clearly intended to confine product restrictions to section 610. In particular, the commenter suggested that the LAEL standards were exclusively intended to cover emissions from the appliance and industrial process refrigeration market. The commenter cited the legislative history behind the creation of section 608 to support its interpretation of section 608.

The EPA disagrees with the commenter's suggestion that reliance on section 608 as additional authority for its actions is unwarranted. EPA considers section 608 to be a multiple phase emission control program. The Agency believes that the authority granted under section 608 (National Emission Reduction Program) may be applied to today's rulemaking, and that LAEL standards may, in certain circumstances, have the same practical effect as the nonessential products ban authorized in section 610.

It is clear from the statute that section 608(a)(1) of the National Recycling and Emission Reduction Program initially affects only appliances and industrial process refrigeration, and the Agency is addressing the recycling of refrigerant in the appliance and industrial process refrigeration sector in the section 608 proposal published in the Federal Register on December 10, 1992 (57 FR 58644). EPA believes, however, that the commenter is incorrect in suggesting that the section 608 LAEL standards apply only to appliances and industrial process refrigeration. Section 608(a)(2) requires EPA to promulgate regulations establishing standards and requirements regarding use and disposal of Class I and II substances not covered by paragraph (1) and section 608(a)(3) requires the reduction of the use and emission of such substances to the lowest achievable level. EPA believes that this statutory language gives the Agency the authority to apply the LAEL standards to all sectors using Class I and Class II substances.

Where adequate substitutes for Class I or Class II substances are available, EPA may make a determination that the lowest achievable level is zero. To implement the LAEL standards, the Agency may issue regulations requiring emission controls, work practices, the use of alternative substances, or simply setting a performance standard. A zero level performance standard under section 608 would amount to an effective ban on the use of Class I or Class II substances in that product category. EPA similarly believes that it has authority under section 608 to require the use of alternatives to certain ozone-depleting substances in specific uses. Consequently, the Agency believes that the requirements of sections 608 and 610 may overlap in some instances, and that reference to the section 608

LAEL standards in this rulemaking is appropriate.

5. Criteria for Determining Nonessentiality

Several commenters felt that Congress only banned frivolous products or products which "when used by nonprofessionals would result in large unwarranted releases of CFCs when measured against the expected beneficial results of the product's use," and that EPA in the proposed rule had overstepped its authority by attempting to ban products that are considered extremely important. EPA believes that the specific products selected by Congress reflect broader criteria for determining a product's status under section 610 than utility alone. Congress specifically cited noise horns as products in which the use of Class I substances is nonessential. Noise horns are primarily used in the area of marine safety; noise horns provide warning and maneuvering signals in case of an emergency. In addition, the noncommercial use of cleaning fluids for photographic and electronic equipment is generally not reviewed as a frivolous end use. Nevertheless, these products were specifically cited in the statute as examples of nonessential uses. Finally, Congress also prohibited the sale or distribution of aerosols and certain foam products containing Class II substances after January 1, 1994 in the nonessential products ban. The products banned in section 610(d) are clearly not all frivolous, and yet Congress banned them as nonessential products. These examples indicate that Congress relied on broader criteria than the utility of the product alone in determining a product's status under section 610, and section 610(b) specifically identified criteria other than the utility of the product for EPA to consider in determining nonessentiality for the purposes of the Class I nonessential products ban. Consequently, EPA disagrees with the commenter's contention.

One commenter who questioned the application of the ban to any product other than frivolous products cited the legal doctrine of *ejusdem generis*. Under this doctrine of statutory interpretation, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. The commenter concluded that under this doctrine EPA's authority to ban other products is limited to frivolous products because the specifically enumerated products identified in sections 610(b) (1) and (2) are all frivolous products.

EPA believes that the doctrine of *ejusdem generis* is inapplicable here because the premise underlying the commenter's conclusion is false. The products specifically listed in sections 610(b) (1) and (2) are not all frivolous products. Only the first product listed in 610(b)(1), plastic party streamers, can be considered frivolous. For the reasons given above, EPA believes that the other product categories listed in 610(b) (1) and (2) clearly include products which are not frivolous. As a result, EPA believes that the specific enumerations in 610(1) and (2) do not limit the Agency's authority to identify nonessential products under 610(b)(3) that are frivolous. Rather, EPA is required by 610(b) to consider a number of factors in determining whether a product is nonessential, including the purpose or intended use of a product, the technological availability of substitutes, safety, health, and other relevant factors.

One commenter suggested that even if substitutes for Class I substances were available, EPA had no authority to ban the sale or distribution of "extremely important" products under section 610 unless substitutes were available for both the product and the Class I substance used in its manufacture. As discussed above and in the proposed rule, EPA believes that the section 610 statutory ban on noise horns, CFC-containing cleaning fluids for noncommercial electronic and photographic equipment, as well as aerosols, pressurized dispensers, and plastic foam products containing Class II substances, clearly indicates congressional intent to include important "nonfrivolous" uses of ozone-depleting substances and products produced with ozone-depleting substances in the nonessential products ban. Moreover, the statute directed EPA to consider the "technological availability of substitutes for such product and for such Class I substance," as well as the purpose or intended use of the product, in determining whether a product was nonessential. However, the statute does not specifically require EPA to determine that substitutes are available for both the product and the Class I substance used in its production. Consequently, EPA believes that the statute authorizes the Agency to ban a product containing or manufactured with Class I substances if, when EPA evaluates such a product against the five criteria mentioned in section 610(b)(3), it determines that adequate substitutes are available for either the product or the use of Class I substances in its manufacture. EPA believes that in cases where such substitutes exist, the Administrator has the authority to determine that products manufactured with Class I substances are nonessential regardless of the importance of these products. In each case, however, EPA must consider all five of the criteria in making its determination.

6. Definition of the Term "Product"

The January 16, 1992 proposed rule discussed EPA's definition of the term "product" at great length. EPA reiterates its belief that the use of the term "product" in section 610 of the statute indicates that Congress intended to apply this term to any type or category of merchandise or commodity offered for sale, as well as any use of a Class I substance in the manufacture or packaging of any such merchandise or commodity.

A number of commenters disputed EPA's definition of the term "product" Several commenters criticized EPA for banning entire categories of products rather than individual products. EPA believes that such an approach is appropriate, and that it is justified by the criteria listed in section 610(b), the statutory treatment of certain groups of products manufactured with or containing Class II substances in section 610(d), and by the tight statutory deadline for promulgation of this regulation.

In determining whether a product is nonessential, section 610(b) of the statute directs the Administrator to "consider the purpose or intended use of the product, the technological availability of substitutes for such product and for such Class I substance, safety, health, and other relevant factors". EPA reiterates its belief articulated in the proposed rule that the statutory mandate to consider the technological availability of substitutes "for such product and for such Class I substance" clearly indicates Congressional intent to focus on the use of Class I substances in broad categories of products as well as in individual products (see NPRM for greater discussion of this issue).

In addition, Congress banned entire categories of products in section 610(d)(2) when it banned aerosols, pressurized dispensers, and plastic foam products containing Class II substances. EPA believes that the statutory language of section 610(d)(2) indicates Congressional intent to address products and the use of ozone-depleting substances by broad use categories, provided that some mechanism exists for addressing particular applications within those categories for which no

suitable substitutes exist, or for which other important concerns might justify an exemption. EPA employed such a mechanism in its section 610 rulemaking for the Class I nonessential products ban. In its NPRM, EPA proposed banning the use of CFCs in two product categories, aerosol products and flexible and packaging foams, but it also exempted products for which it had reason to believe that no satisfactory substitutes were currently available. EPA then carefully considered requests for exemptions received during the public comment period in order to address additional products within these sectors for which no suitable substitutes exist, or for which other concerns might justify an exemption. As a result of this procedure, the final rule includes exemptions from the nonessential ban for several additional products (see sections III.B and IV.E. of today's preamble).

Finally, there are hundreds of thousands of diverse end uses for Class I substances, and EPA clearly could not address the multitude of products and end uses for these substances individually given the tight statutory time-frame for promulgating this regulation. Consequently, EPA adopted the approach taken by Congress in section 610(d)(2) and proposed banning broad categories of products and end uses in the NPRM. EPA then considered any comments requesting exemptions for particular applications within these broad categories and carefully evaluated the information provided by the commenters as to why these particular applications should not be covered by the Class I nonessential products ban. EPA believes that this approach is equitable, comprehensive, and that it represents the most effective use of the Agency's resources.

7. Definition of Interstate Commerce and Grandfathering of Existing Product Inventories

Many commenters addressed the impact of the ban on existing inventories. The primary concern of all these commenters was the treatment of existing inventories of nonessential products after the effective date of the regulation. One commenter, one of the largest producers of CFCs, stated that the November 15th compliance date could affect a large number of products containing up to 50,000 pounds of CFCs.

The commenters expressed concern that banning the sale of these existing inventories would impose significant economic burdens on the affected businesses. Moreover, several commenters observed that recovery and recycling of CFCs from small aerosol containers is difficult and expensive, and that much of the ozone depleting chemical used to produce flexible and packaging foams is released in the foam-blowing process. Consequently, the recall of such products would result in little environmental benefit.

Commenters suggested changing the treatment of existing inventories in the final rule. One commenter, a major manufacturing association, felt that the November 15th compliance date should not apply to the sale of products to the ultimate consumer. Many other commenters proposed grandfathering existing inventories of products that had not been sold by November 15, 1992.

EPA agrees with these commenters that banning the sale of existing inventories after November 15, 1992, would adversely affect a number of businesses without providing any appreciable environmental benefit. The Agency is well aware that redesigning and modifying production facilities cannot be accomplished overnight. EPA is also aware that some of the affected products, such as spare parts for automobiles, which are packaged with foam, have unusually long shelf lives. Moreover, EPA recognizes that the statute contemplated that businesses would have one year to liquidate existing stocks of nonessential products, and that the late publication of the final rule allows manufacturers, distributors, and retailers insufficient time to liquidate existing inventories and revise manufacturing processes. Congress clearly intended to give these individuals a year's notice prior to banning these products. Given the late publication date of the rule, adhering to the November 15, 1992 date for all nonessential products would actually contradict Congressional intent in this regard. However, as of November 15, 1992, the statute clearly prohibits the sale, distribution, or offer of sale or distribution, in interstate commerce of nonessential products identified in EPA regulations (after the effective date of such regulations) one year after promulgation of the Class I nonessential products ban rule.

The affected industries could not have known for certain whether such products would be banned until final promulgation. Consequently, to provide some measure of relief for certain industries, with respect to any such products which Congress anticipated would be banned, EPA has decided to make January 17, 1994 the effective date for the ban on products determined to be nonessential under section 610(b)(3). This action will allow manufacturers, distributors, and retail establishments additional time to liquidate existing inventories of Class I nonessential products, and to phase out of CFC use in these applications in an efficient manner.

EPA believes, however, that the manufacturers, distributors, and retailers of products specifically mentioned in sections 610(b)(1) and 610(b)(2) of the Act have received sufficient prior notice of this action, having been on notice that such products would be banned since enactment of the statute. Consequently, chlorofluorocarbon-propelled plastic party streamers and noise horns may not be sold, distributed, or offered for sale or distribution in interstate commerce as of February 16, 1993, the effective date of this rule. Similarly, cleaning fluids for electronic and photographic equipment which contain chlorofluorocarbons may only be sold, distributed, or offered for sale or distribution, in interstate commerce to commercial purchasers effective on February 16, 1993.

EPA believes that sufficient precedent exists for this decision. The United States District Court for the District of Columbia Circuit has established a four-part test to judge the appropriateness of Agency grandfathering (see *Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983)*). This test involves balancing the results of four analyses, including whether the new rule represents an abrupt departure from previously established practice, the extent to which a party relied on the previous rule, the degree of burden that application of the new rule would impose on the party, and the statutory interest in applying the new rule immediately.

For the reasons stated above, EPA believes that banning the sale, distribution, or offer of sale or distribution in interstate commerce of existing inventories of products first designated as nonessential products in this rulemaking after November 15, 1992 would constitute an abrupt departure from previously established practice and would impose an unreasonable burden on a number of affected parties without providing any significant environmental benefits that might justify an immediate ban. Prior to the publication of today's rulemaking, individuals selling or distributing these products faced no restrictions on their sale or distribution; moreover, until today, these individuals could not know for certain that the products affected under the discretionary authority of section 610(b)(3) of the Act would be identified and banned as nonessential products.

Today's rulemaking does not provide manufacturers, distributors, or retailers of products specifically mentioned in section 610(b)(1) addition time to phase out these nonessential products; however, because EPA believes that their listing in the statute provided sufficient advance notice, publication of the final rule does not in their case constitute an abrupt departure from previously established practice.

In addition, today's rule maintains the proposed rule's ban on the sale of chlorofluorocarbon-containing cleaning fluids for electronic and photographic equipment to noncommercial purchasers effective on February 16, 1993. Since existing inventories of CFC-containing cleaning fluid products not otherwise affected by this rulemaking may still be sold to commercial purchasers, on February 16, 1993 effective date will not impose any significant economic burden on the affected businesses. Manufacturers, distributors and retailers of aerosol chlorofluorocarbon-containing cleaning fluids banned under section 610(b)(3) will not be able to sell, distribute, or offer to sell or distribute, these products in interstate commerce to any user, commercial or noncommercial, after January 17, 1994, the effective date of the ban on products identified under section 610(b)(3). As described above, as with the other nonessential products banned under section 610(b)(3), the affected businesses will thus have an additional year to liquidate their existing inventories of these products after promulgation of these regulations.

One commenter requested that EPA clarify its interpretation of interstate commerce with regard to sale, distribution, or offer of sale or distribution, of nonessential products within the boundaries of a single state. EPA agrees with the commenter that the Act does not ban the sale, distribution, or offer of sale or distribution, of a product otherwise affected by this rulemaking that is manufactured, distributed, and sold without ever crossing state lines. However, the Agency wishes to clearly state its position that to avoid coverage by this rulemaking, an affected party must provide adequate documentation that not only was the product manufactured, distributed, and/or sold exclusively within a particular state, but that all of the components, equipment, and labor that went into manufacturing, distributing, selling, and/or offering to sell or distribute such a product originated within that state as well.

Finally, EPA wishes to clarify its interpretation of sale, distribution, or offer of sale or distribution, in interstate commerce with regard to the resale of used products. The Agency recognizes that more than one consumer often derives utility from owning and using certain durable goods affected by this rulemaking, such as automobiles, boats, or furniture. Many of these products contain components manufactured out of flexible and packaging foam, most notably seat cushions. Restricting the resale of such used durable goods before the end of their productive lifetimes would provide little, if any, environmental benefit because the CFCs used to blow foam for these products were, for the most part, released during their manufacture. Because restricting the resale of such used durable goods would impose significant economic hardship on a great many consumers without providing any associated environmental benefits, EPA does not feel that Congress intended to ban their resale. Consequently, while EPA's interpretation of "interstate commerce" is such that interstate commerce includes the entire chain of sale and distribution from the manufacturer of a new product to its ultimate consumer, the Agency recognizes that in the case of durable consumer goods such as boats, cars, and furniture, resale of the product to additional consumers may occur after the sale of the new product to the ultimate consumer. In such cases, EPA does not consider the resale of these nonessential products to constitute sale, distribution, or offer of sale or distribution, in interstate commerce for the purposes of this rulemaking.

8. Verification, Recordkeeping and Public Notice Requirements

Over 60 commenters considered the recordkeeping provisions contained in the proposed rule to be burdensome and unnecessary. The Agency considered the need for recordkeeping requirements at great length as a result of these comments. EPA was concerned by the suggestion that the burden imposed by these requirements far outweighed any health and environmental benefits associated with them.

The total volume of CFCs used in the U.S. in 1988 for both commercial and noncommercial cleaning fluids for electronic and photographic equipment was approximately 3000 metric tons, or less than 0.8 percent of the total use of Class I substances (weighted for ozone-depletion potential). EPA estimates that noncommercial sales represented a small but not insignificant fraction of this total 1988 use estimate and that total sales have dropped since 1988, due to the tax and the scarcity of CFCs caused by the phaseout regulations. EPA believes that the excise tax on CFCs and the limits on production and imports have already raised the price of CFCs sufficiently so that it may no longer be economical to use them as cleaning fluids for noncommercial equipment. As a result, the current sales of cleaning fluids for electronic and photographic equipment to noncommercial users are likely to be substantially lower than the 1988 level. Nevertheless, the statute specifically requires EPA to ban the sale of these products for noncommercial use. Consequently, the Agency sought to devise a means to meet the statutory requirements without imposing an undue burden on the public.

EPA has decided to eliminate the specific recordkeeping requirements proposed in the NPRM. The Agency agrees with the commenters that these requirements are too burdensome when compared to the associated environmental benefits. Instead of requiring distributors to maintain records of transactions involving CFC-containing cleaning fluids, today's final rule merely requires sellers and distributors to post signs stating that sale, distribution, or offer of sale or distribution, in interstate commerce of these products to noncommercial users is prohibited and that purchasers of these products must provide verification that they are commercial users. In addition, sellers and distributors are required to verify that purchasers of these products are commercial users. In order to purchase these products, commercial users would have to prove that they are indeed commercial entities. EPA anticipates that purchasers could fulfill this requirement by presenting any number of documents, including but not limited to invoices, purchase orders, or official correspondence, containing a commercial identification number. Sellers and distributors would have to have a reasonable basis for believing that the information presented by the purchaser is accurate and thus that the purchaser is in fact a commercial user.

EPA believes that this approach minimizes the burden of implementing the Congressionally-mandated ban on the sale of CFC-containing cleaning fluids for noncommercial electronic and photographic equipment. The Agency feels that some form of verification is necessary to ensure that these products are not sold to noncommercial users. Requiring purchasers to present, and sellers and distributors to verify, some proof of their commercial status is certainly less burdensome than the recordkeeping requirements discussed in the proposed rule. EPA could not conceive of requirements less

burdensome than these that would nonetheless meet the statutory requirement to prevent noncommercial users from purchasing CFC-containing cleaning fluids.

One commenter recommended that EPA include government contract numbers as an acceptable identification option in the sale of cleaning fluids for electronic and photographic uses to government clients who would not have a commercial identification number. The Agency believes the use of a government contract number in verification of commercial status to be a sound option which would not compromise the sales restriction to noncommercial sources.

One commenter suggested that the definition of distributor should be revised to reflect resale of CFC-containing cleaning fluids to other distributors rather than sale to the ultimate consumer. EPA believes that the commenter has raised a valid point. A number of companies that sell these products to consumers also use the products themselves (for example, many computer retailers also perform service on customers' computer equipment which requires the use of cleaning fluids). Given the nature of this industry, it may be difficult for any person who sells or distributes these products to determine whether the purchaser intends to use them or resell them; the purchaser himself may not be certain at the time of purchase whether he intends to use or resell these products. Consequently, EPA has revised the definition of distributor to include resale of CFC-containing cleaning fluids to other distributors. The Agency would like to point out, however, that due to its decision to eliminate recordkeeping requirements, this change will not require any additional recordkeeping. The Agency believes that the burden involved in verifying that a distributor who purchases these products is a commercial entity will be minimal.

9. Imports and Exports

Two commenters requested clarification on whether the import of products made with CFCs would be prohibited under the ban. EPA believes that both the import of any product for sale or distribution within the United States, or the initial sale or distribution of any product intended for ultimate export from the point of manufacture to the point of export, are acts of interstate commerce for the purposes of section 610 and would, accordingly, be affected by this regulation. The import or export of products affected by today's rulemaking will be subject to the same restrictions as the sale, distribution, or offer of sale or distribution, in the United States (for a discussion of EPA's interpretation of "interstate commerce," see section III.A.7. of today's preamble). EPA will work in close cooperation with the U.S. Customs Service to enforce this restriction. Because today's rulemaking prohibits the sale, distribution, or offer of sale or distribution, in interstate commerce of products banned pursuant to section 610(b)(3) effective on January 17, 1994, these products may continue to be imported, or sold or distributed for export, until January 17, 1994.

10. Future Regulation

Several commenters criticized EPA for limiting the scope of today's rulemaking primarily to plastic flexible and packaging foams and aerosols and pressurized dispensers that release CFCs. In addition, several commenters discussed a number of products not covered by the proposed rule. Several of these products or processes, such as tobacco expansion, aerosol insulating foam, and the use of closed-cell polyurethane foam as a flotation foam, may meet the criteria for nonessentiality; nevertheless, as discussed elsewhere in today's rulemaking, EPA believes that it would be inappropriate to ban them in today's final rule because the Agency did not propose banning these products in the NPRM.

The status of methyl chloroform under the nonessential products regulation was raised by four commenters, and at the public hearing, one commenter criticized EPA for not covering methyl chloroform in the Class I nonessential rule. This commenter cited a major corporation's policy of phasing out the use of methyl chloroform by the end of 1992 to support the inclusion of methyl chloroform in the Class I nonessential products ban. The Agency encourages and applauds companies that have phased out the use of ozone depleting chemicals as quickly as possible, and it reiterates its belief that substitutes are available for many of the current uses of methyl chloroform. Methyl chloroform is a chemical with many extremely diverse end uses, however, and insufficient time was available for the Agency to analyze the uses of methyl chloroform systematically given the short statutory time-frame mandated for this rulemaking. The Agency will continue to collect information on the uses of methyl chloroform.

The Agency is aware that the potential exists for eliminating other nonessential uses of ozone-depleting substances. In that regard, EPA wishes to emphasize that, in general, other sections of the Act provide sufficient controls for reducing emissions of ozone-depleting substances. The use sectors and product categories addressed by the commenters have already been affected by the section 604 phaseout of the production of ozone-depleting substances and the excise tax on ozone-depleting substances. In addition, it is possible that they may also be specifically addressed in a number of other provisions of title VI. For example, the Agency is currently developing regulations to implement section 608, concerning emission limitations, and section 612, concerning safe substitutes, as well as the accelerated phaseout required by the recent modifications to the Montreal Protocol. The products and use sectors discussed in the Class I nonessential products ban will be affected by these regulations as well.

EPA will continue to collect information on the use of CFCs and acceptable substitutes. EPA has the authority to revise the list of products banned under sections 610(a) and 610(b), and, although the Agency does not at this time anticipate the need to add other products to the list of banned Class I products, it reserves the right to undertake additional rulemaking in the future regarding products that release Class I substances into the environment as necessary and appropriate.

11. Regulatory Impact Analysis

One commenter suggested that banning the use of CFCs in plasma etching would increase the costs associated with this regulation to over $100 million. Executive Order 12291 requires agencies to conduct a Regulatory Impact Analysis for regulations with economic impacts which exceed this level. Consequently, the commenter requested that EPA conduct a regulatory impact analysis (RIA) for the Class I nonessential products rulemaking if the use of CFCs in plasma etching was banned. EPA believes that the commenter is correct in observing that prohibiting the use of Class I substances in plasma etching would significantly increase the economic costs associated with the Class I nonessential products ban. However, as discussed elsewhere in today's rulemaking, EPA does not intend to ban the use of Class I substances in plasma etching. Consequently, the Agency believes that the cost and benefits chapter of the background document adequately addresses the regulatory impact of section 610, since it is considered to be only a minor rulemaking (see

Background Document). EPA believes that preparing an RIA is not required by the Executive Order for the Class I nonessential products ban rulemaking, and that consequently, preparing such a document would be redundant and inappropriate.

B. Specific End Uses

1. Statutorily Mandated Products

Section 610 listed three specific products to which the Class I nonessential products ban applies: Chlorofluorocarbon-propelled plastic party streamers, chlorofluorocarbon-propelled noise horns, and chlorofluorocarbon-containing cleaning fluids for noncommercial electronic and photographic equipment.

The statute left EPA little discretion with regard to the treatment of these products under the nonessential products ban, and no significant comments were received regarding them, with the exception of comments on the treatment of existing inventories. As mentioned in section II.A.6. of today's preamble, the final rule bans the sale, distribution, or offer of sale or distribution, in interstate commerce of these products effective on February 16, 1993.

2. Foams

a. *Distinciton between insulation foams and flexible and packaging foams.* One commenter suggested that the distinction between thermal insulation foams (which are excluded from the Class I nonessential products ban) and flexible and packaging foams (which are covered by the Class I ban) should not be reapplied for the Class II ban. According to the commenter, the legislative history indicates that the definition of insulation foams to be exempted from the Class II ban should be expanded beyond thermal insulation and include foam cushioning for other uses such as medical and electronic supplies. However, the commenter did not question EPA's decision to exempt thermal insulation foams produced with CFCs from the Class I nonessential products ban. EPA will consider the commenter's recommendations on the definition of "foam insulation product" in preparing the proposed rule for the Class II ban.

b. *Flexible polyurethane slabstock foam.* In the January 16, 1992 NPRM, EPA proposed to ban the use of CFCs in flexible polyurethane slabstock foam. The Agency also requested comment on the potential impacts of individual states' limits on the use of methylene chloride (MeCl) as a blowing agent in flexible polyurethane slabstock foams. EPA received two comments arguing that state and regional restrictions on the use of MeCl are unlikely to impose significant economic burdens on flexible foam manufacturers because acceptable alternative technologies are currently available. The Agency also received a third comment arguing that a ban on the use of CFC–11 in flexible polyurethane slabstock foam production, in conjunction with the impending 1994 Class II nonessential products ban on the use of HCFCs in the production of certain foams and the possible future restriction on methyl chloroform use as well, would cause production of super-soft and low-density foams to cease in those states that limit the use of MeCl. The commenter also urged EPA to allow limited exceptions to the ban until January 1, 1994 for those companies likely to be adversely affected by it. EPA carefully considered these comments in developing the provisions of the final rule that affected the production of flexible polyurethane slabstock foam.

In making its determination, EPA examined the purpose and intended use of flexible polyurethane slabstock foam. Flexible polyurethane slabstock foam finds use in cushioning applications for furniture, carpet underlay, bedding, automobile upholstery, and packaging, among others. EPA does not consider the purposes for which flexible slabstock is employed to be "frivolous."

EPA determined, however, that adequate substitutes for CFCs in the production of flexible polyurethane slabstock foam were indeed available. According to the 1991 UNEP Flexible and Rigid Foams Technical Options Report, CFC–11 use represents only a small fraction of total auxiliary blowing agent use in flexible slabstock foams. Because the vast majority of flexible slabstock producers have converted from CFC–11 to alternative blowing agents and processes, EPA believes that substitutes for CFCs are readily available in this area and that the use of CFCs in flexible polyurethane foam is therefore nonessential. At present, there are a number of alternatives to the use of CFCs in flexible polyurethane slabstock foam. MeCl represents the most widely used and widely available alternative. In areas that restrict the use of MeCl, manufacturers have turned to alternative blowing agents such as acetone, HCFCs, and methyl chloroform. Other near-term alternatives are also available. For example, modifications in polyol technology and the use of softening additives can reduce or even eliminate the need for certain auxiliary blowing agents. "AB" technology, which uses formic acid to double the quantity of gas produced during the isocyanate reaction, may offer a viable alternative to CFCs in those areas where other substitutes are infeasible. Finally, an increase in the density of foam produced can dramatically reduce the need for auxiliary blowing agents.

There are a number of safety and health issues associated with the possible substitutes for CFCs in the production of flexible polyurethane slabstock foam; however, EPA believes that with the proper precautions these alternatives can be used safely. EPA has classified MeCl as a probable human carcinogen with an Occupational Safety and Health Administration Permissible Exposure Limit (OSHA PEL) of 25 parts per million. Flexible foam manufacturers that use MeCl must follow appropriate worker health and safety practices. Acetone is extremely flammable, and manufacturers must ensure that ventilation is adequate, and they may need to take other safety precautions as well. Moreover, acetone is a volatile organic compound (VOC) that can contribute to the formation of ground-level ozone (smog). States have the primary responsibility for enforcing the National Ambient Air Quality Standards (NAAQS) that relate to ground-level ozone, and the use of acetone could be subject to restrictions in those regions classified as ozone nonattainment areas. HCFCs and methyl chloroform, although they have much lower potential to deplete stratospheric ozone than CFCs, have measurable ozone-depletion potentials; consequently, other sections of title VI place restrictions on HCFCs and methyl chloroform. Finally, the formic acid used in the "AB" process has a low Ph and requires special handling. In addition, the carbon monoxide produced by the reaction between the isocyanate and the formic acid can prove harmful without proper ventilation. While each of these alternatives presents some degree of risk to human health and the environment, EPA believes that with the proper precautions, each can be considered a possible substitute for CFC–11 in the production of super-soft and low-density flexible polyurethane slabstock foam. Consequently, the Agency believes that substitutes are available for this use of CFC–11, and that flexible polyurethane slabstock foam produced with CFC–11 is a nonessential product.

In making its determination to classify CFC use in flexible and packaging foams as nonessential, EPA also considered several other relevant factors. EPA believes that the excise tax on CFC–11 will provide a continuing incentive for manufacturers to convert to less costly

alternatives. Moreover, in those areas where MeCl use is restricted, the wide range of near-term alternatives for CFC–11 should provide flexible slabstock manufacturers with sufficient opportunity to find an acceptable substitute. As a result, EPA expects the economic impacts associated with a ban on CFC use in flexible slabstock foams to be minimal.

Based on consideration of the above criteria, EPA believes that the use of CFCs in flexible polyurethane slabstock foam is nonessential. Therefore, today's final rule bans the use of CFCs in flexible polyurethane slabstock foam. In response to the commenter's request for a limited exemption, EPA seriously considered allowing companies with foam production facilities located in NAAQS nonattainment areas for ground-level ozone in states that prohibit the use of methylene chloride to petition the EPA for a limited exemption to the ban until January 1, 1994. For EPA to grant such an exemption, petitioners would have had to satisfactorily document the reasons why these particular facilities could not modify their production processes without undue hardship. However, the effective date in today's rulemaking for the ban on production of flexible and packaging foams with CFCs is January 17, 1993. Since the effective date of the ban on CFC use in flexible slabstock foams roughly coincides with the date requested in the comment for the termination of the limited exemption, such an exemption appears unnecessary.

c. *Integral skin foam.* Two commenters addressed the use of polyurethane integral skin foam in automobiles. Polyurethane integral skin foam is used for flexible molded foam steering wheels and pads. One commenter was concerned that integral skin foam may be covered by the Class I rulemaking due to the broad regulatory language under the plastic flexible foam and packaging foam categories, and requested an exemption for the use of CFC–11 in the production of integral skin foam until January 1, 1994. The other commenter asserted that it had developed a process for producing integral skin foam using water as the blowing agent. EPA wishes to clarify the status of integral skin foam under the Class I nonessential products rulemaking. The Agency does not consider integral skin foam to be a plastic flexible or packaging foam product (see section I.I.3. of today's preamble), and EPA has not included integral skin foam in the Class I nonessential products ban. Consequently, there was no need to consider the commenter's request for an exemption for the use of CFC–11 in the production of integral skin foam. However, the phaseout of the production of CFCs by 1996 required under the newly-modified Montreal Protocol will force manufacturers to adopt alternatives to CFCs within a relatively short period of time regardless of the nonessential products ban. In addition, the Agency must consider the production of integral skin foam during the rulemaking for the Class II nonessential products ban. Consequently, EPA was pleased to learn from the public comments that the automobile industry expects to completely phase out the use of CFCs, as well as HCFCs, in the production of integral skin foam by January 1, 1994.

d. *Closed cell polyurethane foam used as flotation form.* EPA provided several illustrative examples of "noninsulating uses" for flexible and packaging foams in its preamble to the proposed rule, including flotation foam. Since publication of the proposed rule, EPA has become aware that closed cell polyurethane foam, which EPA does not consider a flexible or packaging foam, is used as a flotation foam in the manufacture of certain boats. At least one manufacturer uses a CFC-blown foam as both structural and flotation material in the manufacture of its boats. Consequently, in drafting today's rulemaking, EPA considered whether it should include this application in the Class I nonessential products ban.

In evaluating this application of closed cell polyurethane foam, EPA examined the purpose and intended use of flotation foam. Flotation foam serves as an important safety feature of many small watercraft. In addition, in at least one product line, closed cell polyurethane foam serves as a structural element as well. Consequently, EPA does not believe that the purpose of closed cell polyurethane flotation foam is "frivolous."

The use of CFCs in this product, which EPA does not consider a flexible or packaging foam, may not be nonessential at the present time. One manufacturer of closed cell polyurethane flotation foam has indicated its intention to convert from CFCs to HCFCs in the near future. However, EPA has not verified that all uses of closed cell polyurethane flotation foam have available non-CFC alternatives at this time.

Flotation foam serves an important safety function in the design and operation of boats, and EPA does not want to take action that would jeopardize the continued manufacture of this type of foam. However, EPA is concerned about the risks to human health and the environment posed by continued use of Class I substances in the manufacture of closed cell polyurethane flotation foam as well. As a result, the Agency intends to continue examining the need to prohibit such use.

EPA also considered several other relevant factors. EPA believes that the excise tax on CFCs will provide a continuing incentive for manufacturers to move away from the use of CFC–11 where possible. In addition, the accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban.

Finally, EPA believes that it would be inappropriate to include new product categories in the ban that were not considered by the proposed rule. EPA believes that the Administrative Procedure Act and section 307(d) of the Clean Air Act require EPA to propose rulemaking and take comment before proceeding to final rulemaking. In preparing the proposed rule, EPA relied heavily upon the research conducted for the 1991 UNEP Flexible and Rigid Foams Technical Options Report. EPA participated in the development of the definitions of product categories utilized in the UNEP technical options reports, and the Agency routinely employs these categories in its own reports, internal documents, and rulemakings. The UNEP report categorizes closed cell polyurethane foam as an insulating foam rather than a flexible or packaging foam. EPA, too, categorizes closed cell polyurethane foam as an insulating foam, not a flexible and packaging foam. Because EPA was unaware that closed cell polyurethane foam was used as a flotation foam at the time the NPRM was published, it did not include the use of closed cell polyurethane foam as a flotation foam in the proposed Class I nonessential products ban.

Today's rulemaking covers only products proposed in the January 16, 1992 proposed rule. Consequently, closed cell polyurethane flotation foam is not included in the nonessential products ban implemented by today's rulemaking. However, EPA research indicates that the use of CFC-blown closed cell polyurethane foam as flotation foam may indeed meet the criteria for nonessentiality. The Agency is also aware that the self-effectuating 1994 ban on HCFC use in noninsulating foams could encourage movement away from HCFCs and back to CFCs. Because the Agency intends to avoid promoting such environmentally harmful activity,

it will continue to examine the need to prohibit CFC use in closed cell polyurethane flotation foams. EPA has the authority to consider designating as nonessential other products which release ozone-depleting substances in future rulemakings, and the Agency may consider such action if at a later date EPA determines that these products satisfy the criteria for nonessentiality.

e. *Coaxial cable.* EPA did not address the issue of coaxial cable in the preamble to the proposed rule. At the time that EPA promulgated the proposed rule, the Agency was unaware that CFCs are used in the production coaxial cable. Moreover, the Agency received no formal comments regarding CFC use in coaxial cable. However, since promulgation of the proposed rule, manufacturers of coaxial cable have informed EPA that such use exists.

Coaxial cable is widely used as a transmitter of telephone and television signals. It consists of two conductors (e.g., steel and aluminum) separated by a dielectric (nonconducting) material. Manufacturers claim that acceptable dielectric material must generate a specific wave pattern to ensure against problems such as "signal dropout." As a result, the foam within coaxial cable must confirm to stringent performance standards.

At least one cable manufacturer currently employs an extruded polyethylene foam blown with CFC–12 as the dielectric material in its coaxial cable. The same manufacturer is in the process of converting to a non-ODP blowing agent to replace its use of CFC–12; however, it is unclear whether other manufacturers of coaxial cable could take advantage of this process.

In evaluating this product, EPA examined the purpose and intended use of coaxial cable. EPA recognizes that the purposes served by coaxial cable are not "frivolous."

EPA has not been able to determine that adequate substitutes for CFCs in the production of coaxial cable are available. Therefore, the use of CFCs in this area may not be nonessential at the present time. It appears that the largest manufacturer of coaxial cable does not use CFCs in the manufacture of its product. In addition, another manufacturer of coaxial cable has indicated its intention to convert to a non-ODP blowing agent in the manufacture of its product. However, EPA knows very little about these substitutes at this time, and the Agency has been unable to confirm that substitutes for CFCs are currently available for most coaxial cable manufacturers.

EPA is also concerned about the tradeoff between the risks to human health and the environment posed by continued use of Class I substances in the manufacture of coaxial cable and the risks to human health and the environment posed by the use of particular substitutes. As a result, EPA intends to continue collecting information on possible CFC substitutes for this application.

EPA also considered several other relevant factors. A ban on CFC use in the manufacture of coaxial cable could prove harmful to some coaxial cable manufacturers. Moreover, EPA believes that the excise tax on CFCs will provide a continuing incentive for coaxial cable manufacturers to move away from the use of CFC–12 where possible. In addition, the accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban.

Consequently, EPA does not intend to ban the use of CFCs in coaxial cable at this time. However, the Agency will continue to examine the need to take action in the future to prohibit the use of CFCs in the manufacture of coaxial cable.

f. *Aerosol polyurethane foam.* Aerosol polyurethane foam, also known as one component foam, is used by both the building industry and by do-it-yourselfers in a variety of applications. These include draft-proofing around pipes, cable runs, doors and windows; sealing doors and window frames; and joining together insulating panels, roofing boards, and pipe insulation.

CFC–12 has traditionally been the blowing agent of choice for aerosol foams because of its relatively low boiling point. CFC–12 acts both as a propellant and as a blowing agent yielding "frothed foam" that does not flow away from the site of its application. In recent years, there has been widespread conversion away from CFC–12 and toward alternatives such as HCFC–22 and hydrocarbons.

EPA did not address aerosol foams directly in the preamble to the proposed rule. However, the Agency wishes to clarify that, for the purposes of this rulemaking, aerosol foams will be treated as foams and not as aerosols. EPA believes that this approach is consistent with regulations published by the Internal Revenue Service (52 FR 56303) that treat spray foam as an insulating foam product for tax purposes. Despite this determination, EPA did evaluate this product against the criteria in section 610(b)(3).

EPA does not believe that either the purpose or intended use of aerosol polyurethane foam is "frivolous." Moreover, because substitutes for CFCs in aerosol polyurethane foam may not be available for all applications, EPA did not determine that the use of CFCs in this product is nonessential at this time.

While many manufacturers have converted from CFCs to alternatives such as HCFCs and hydrocarbons, it is not clear that non-CFC substitutes are adequate for all applications at the present time. Hydrocarbons may pose flammability risks both at the point of manufacture and at the point of use. In addition, both hydrocarbons and HCFCs lack the thermal insulating capabilities of CFC–12.

Hydrocarbons, because of their flammability, may pose significant risks to safety and health when used as propellants and blowing agents in aerosol foams. However, EPA is also concerned about the risks to human health and the environment posed by continued use of Class I substances in aerosol foams. As a result, the Agency intends to continue examining the need to prohibit such use.

In evaluating aerosol polyurethane foam, EPA also considered several other relevant factors. Certain manufacturers may be unable to convert to non-CFC alternatives at this time due to considerations of safety, energy efficiency, or technological viability. As a result, a ban on the use of CFCs in aerosol foams may be undesirable. Moreover, EPA believes that the excise tax on CFCs will provide a continuing incentive for manufacturers to move away from the use of CFC–12 where possible. In addition, the accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban.

Finally, EPA believes that it would be inappropriate to include new product categories in the ban that were not considered by the proposed rule. EPA considers aerosol polyurethane foam to be an insulating foam, not a flexible and packaging foam. Consequently, this product was not included in the proposed Class I nonessential products ban. Today's rulemaking covers only products proposed in the January 16, 1992 proposed rule; consequently, aerosol polyurethane foam is not included in the nonessential products ban implemented by today's rulemaking. However, preliminary EPA research indicates that the use of CFCs in aerosol polyurethane foam may indeed meet the criteria for nonessentiality. EPA has the authority to consider designating as nonessential other products that release ozone-

depleting substances in future rulemakings, and the Agency may consider such action if at a later date EPA determines that these products satisfy the criteria for nonessentiality.

3. Aerosols

a. *Impact of 1994 Class II nonessential products ban.* Several commenters argued that the proposed rulemaking's inclusion of aerosol products was unwarranted. They felt that EPA's concern that some manufacturers would switch from the use of Class II substances to Class I substances in certain products after January 1, 1994, was unjustified. The commenters stated that market forces would prevent Class I substances from being used in place of Class II substances after 1994. In response, the Agency wishes to emphasize that it is encouraged by steady movement of the aerosol market into non-ozone depleting compounds. EPA believes that the use of Class I substances in place of Class II substances in most aerosol products after January 1, 1994 is unlikely. However, without a regulatory restriction on the use of CFCs in aerosols, there are possible scenarios under which the use of CFCs may be attractive in 1994, when the ban on the use of HCFCs in aerosols takes effect. Consequently, EPA reiterates the view expressed in the proposed rule that the Class I ban on aerosols is necessary to prevent federal policy from actually encouraging additional destruction of the stratospheric ozone layer.

One commenter was concerned that by banning the use of CFCs in aerosol products, EPA was closing the provisions made in the Act for granting exceptions for the use of Class II substances. EPA notes that the commenter is correct in observing that today's rulemaking may impact the Class II ban on aerosol products. However, this does not render the exceptions in the statute irrelevant. The Act permits the continued use of Class II compounds only if the Administrator determines that the aerosol product or pressurized dispenser is essential as a result of flammability or worker safety concerns and that the only available substitute is a legally available Class I substance. While today's rulemaking does restrict the use of Class I substances in aerosol products, this is not contrary to Congressional intent. EPA is not banning all uses of Class I substances in aerosols; consequently, while today's action reduces the number of possible candidates for exceptions to the Class II ban on aerosol products, it does not preclude future action to except uses of Class II substances in aerosols or pressurized dispensers.

The restrictions on the use of Class I substances in aerosols and other pressurized dispensers under today's regulations are rooted in the fact that for many aerosol uses, which were exempted under the 1978 aerosol ban, substitutes have since been developed. EPA has shown considerable flexibility in granting exceptions for Class I compounds where a substitute is unavailable (MDIs and mold release agents, for example). In addition, the exception for the use of Class II compounds due to flammability and worker safety concerns presents another opportunity for the Agency to grant limited exceptions for the use of Class II substances.

b. *Clarification of "aerosols and other pressurized dispensers".* One commenter requested that EPA examine the use of the phrase "other pressurized dispensers" in the language for the aerosol restrictions. According to the commenter, "other pressurized dispensers" could be interpreted as applying to pressurized containers ("bulk containers") used to distribute materials for use in other products because these materials generally are self-pressurized when so contained. The commenter proposed that EPA exclude any pressurized vessel being used as the containment vessel for distribution purposes when the material therein contained is self-pressurized. EPA agrees with the commenter that further clarification of the definition of pressurized containers is necessary. The use of the phrase "other pressurized dispensers" was meant to include non-aerosol products such as CFC–12 dusters and freeze sprays. EPA does not believe that the term "other pressurized dispensers" applies to pressurized containment vessels such as small containers of motor vehicle refrigerant or containment vessels for recycled, recovered or reclaimed refrigerant. Such an interpretation would have a devastating and unintended impact on the air conditioning and refrigeration industry.

As a result of this comment, EPA wishes to clarify that the phrase "aerosol product or other pressurized dispenser" does not include containers which are used for the transportation or storage of Class I substances or mixtures (bulk containers are described in 40 CFR 82.3(i) and the July 30, 1992 final rule implementing section 604 and related provisions of sections 603, 607, and 616 of the Act (57 FR 33754)). Such a bulk container is not part of a use system; rather, as specified in 40 CFR 82.3(i), the "substance or mixture must first be transferred from a bulk container to another container, vessel, or piece of equipment in order to realize its intended use." An example of an ambiguous situation affected by this clarification is the use of a 12-ounce container of CFC–12 used to recharge a motor vehicle air-conditioner. The CFC–12, while it is in the container, is not acting and will not act as a refrigerant. The CFC must be charged into the motor vehicle air conditioning system before it can serve as a refrigerant. Once the refrigerant is charged into the air-conditioner, the container is discarded and serves no purpose in the operation of the air-conditioner. Since the container only serves to transport and store the chemical, EPA considers it to be a bulk container, and not subject to the Class I nonessential products ban.

c. *Dusters and freeze sprays.* One commenter requested an exemption for the use of CFC–12 in freeze sprays used on electronic equipment. Another commenter expressed its belief that the Act specifically prohibited the sale or distribution of Class II substances such as HCFC–22 in aerosols after January 1, 1994, but allowed the continued sale or distribution of CFC–12 dusters. The commenter felt that the use of CFC–12 in aerosol dusters was an unacceptable loophole. EPA wishes to clarify that while the Act does not specifically ban the use of Class I substances in aerosol dusters, it requires EPA to identify and ban nonessential products containing Class I substances. Consequently, the final rule addresses a number of Class I use sectors not specifically identified in the statute, including aerosols and plastic flexible and packaging foams.

Dusters and freeze sprays (also referred to as freezants) typically contain a pressurized fluid, such as CFC–12, which is released as a gas (duster) or as a liquid (freezant). Dusters and freeze sprays contain only one ingredient and are used for both commercial and noncommercial applications. The noncommercial use of dusters was addressed earlier in the preamble (see section I.I.1.c.). EPA considers gas sprays containing CFCs to be among the products described as CFC-containing cleaning fluids for noncommercial electronic and photographic equipment in section 610(b)(2). Consequently, the sale of gas sprays to noncommercial purchasers is banned by today's rulemaking, as required by the statue.

Dusters are primarily used in the electronic and photographic industries to blow fine dirt materials and dust away from products which need to be kept dust-free and which cannot be wiped clean. Freeze sprays can be used

for a variety of purposes including shrink fitting small metal products, testing for faults in electronic equipment, some medical applications, and the removal of chewing gum and other waxy or gummed substances from various surfaces.

Based on information in a recent report to EPA's Office of Research and Development and information provided by commenters, EPA evaluated dusters and freeze sprays against the criteria for nonessentiality and determined that the use of CFCs in these aerosol products, i.e. as propellant or sole ingredient, does not warrant an exemption and, therefore, should be banned as nonessential.

Dusters and freeze sprays serve an important and nonfrivolous purpose for the electronics industry as well as other users. EPA has not determined that the purpose and intended use of these products is nonessential. However, because there are commercially available substitutes, EPA believes that the use of CFC–12 in dusters and freeze sprays is nonessential.

Several substitute formulations for the use of CFC–12 in dusters and freeze sprays have been identified, including HCFCs, hydrocarbons, and inert gases (e.g., carbon dioxide and nitrogen oxide). Non-aerosol alternatives are also available. EPA believes, therefore, that adequate substitutes are readily available for CFC–12 as the sole ingredient in dusters and freeze sprays.

EPA is aware that, to ensure the safety of workers in the electronics industry, alternative formulations for aerosol products used on electronic or electrical equipment must be nontoxic and, in most applications, nonflammable. EPA believes, however, that effective and safe non-CFC propellants are readily available.

In making its determination regarding these products, EPA also considered the economic impact of banning these products. EPA acknowledges that any manufacturers still producing CFC dusters or freeze sprays would suffer some economic impact as a result of this rule. EPA believes, however, that given a 12-month period before the ban on these products takes effect, these manufacturers will have sufficient opportunity to liquidate existing inventories and reformulate their products with a substitute for CFC–12. In any case, manufacturers will have to convert to a non-CFC substitute soon, given the phaseout of CFC production by January 1, 1996 under the modified Montreal Protocol.

In conclusion, EPA has determined that the use of Class I substances such as CFC–12 as the sole ingredients in dusters or freeze sprays is nonessential and, therefore, dusters and freeze sprays are included in the ban on nonessential products promulgated in today's rulemaking. Consequently, the loophole which concerned the second commenter will not exist.

d. *Lubricants, coatings, and cleaning fluids for electrical or electronic equipment.* In the proposed rule, EPA proposed to ban the use of CFCs in all aerosol products and pressurized dispensers with a number of exemptions, including the use of CFC–11 or CFC–113 in lubricants, coatings, and cleaners for commercial electrical and electronic uses. EPA received one comment requesting that the exemption for commercial electrical and electronic uses be expanded to include CFC–12.

Lubricants and coatings typically contain an active ingredient (the lubricating or coating material), a solvent or diluent, and a propellant. Cleaning fluids can include solvent sprays and gas sprays (gas sprays are discussed in the preceding section on dusters and freeze sprays). The solvent sprays typically contain a solvent and a propellant and are dispensed as a liquid. Lubricants, coatings and cleaning fluids can contain CFCs as either solvents or as propellants. CFC–11 and CFC–113 are the most common CFCs used as solvents, although a commenter claimed that CFC–12 is also used as a solvent in certain applications. CFC–12, however, is most commonly used as a propellant. EPA believes that the use of CFC–12 as a solvent rather than a propellant is very small.

Based on information in a recent report by EPA's Office of Research and Development and information provided by commenters, EPA evaluated lubricants, coatings, and cleaning fluids for electrical and electronic equipment against the criteria for nonessentiality and determined that: (1) Use of CFCs as solvents or diluents in these aerosol products should not be banned, but that (2) use of CFCs as propellants in these aerosol products does not warrant an exemption and, therefore, should be banned.

Lubricants, coatings and cleaners for electronic and electrical equipment serve an important and nonfrivolous purpose for the electronics industry. EPA has not determined that the purpose and intended use of these products is nonessential.

EPA research indicates that adequate substitutes for the use of CFCs as solvents or diluents in these applications may not yet be available. In November 1989, EPA's Office of Research and Development (ORD) published an evaluation of the need for continued use of CFCs in both exempted and excluded uses of CFCs in aerosols (see Alternative Formulations). The ORD report concluded that adequate substitutes did not yet exist for lubricants, coatings and cleaners using CFC–11 or CFC–113 for commercial electrical and electronic equipment. EPA believes that adequate substitutes have still not been found for CFCs used as solvents or diluents in these aerosol products. In addition, according to a commenter, CFC–12 is occasionally used as a solvent in these products. EPA believes that the use of CFC–12 as a solvent is similar to that of CFC–11 and CFC–113 and that substitutes may not be available for this application either.

However, several substitute formulations for the use of CFC–12 as a propellant have been identified, including HCFCs, hydrocarbons, and inert gases (e.g., carbon dioxide and nitrogen oxide). These substitute propellants are suitable for use as propellants in products that contain other ingredients, such as solvent sprays, lubricants, and coatings. Non-aerosol alternatives are also available. EPA believes, therefore, that adequate substitutes are available for CFC–12 as a propellant in lubricants, coatings, and cleaners for commercial electrical and electronic equipment.

EPA is aware that, to ensure the safety of workers in the electronics industry, alternative formulations for aerosol products used on electronic or electrical equipment must be nontoxic and, in most applications, nonflammable. EPA believes that, while effective and safe non-CFC propellants are readily available, non-CFC solvents may not be available.

In making its determination regarding these products, EPA also considered the economic impact of banning these products. Since substitutes for CFC solvents in aerosol lubricants, coatings, and cleaners for electronic equipment are not readily available, banning these products could have a significant economic impact on the electronics industry.

In conclusion, EPA will permit the continued use of CFC–11, CFC–12, and CFC–113 in aerosol lubricants, coatings and cleaners for electronic and electrical equipment if the CFCs are used as solvents or diluents. EPA has, however, determined that the use of CFC–12 as a propellant is nonessential and, therefore, its use is banned. As noted above, EPA believes that the use of CFC–12 as a solvent rather than as a propellant is very limited. EPA, therefore, expects that CFC–12 will be used in very few aerosol products and only in situations where the

manufacturer can clearly demonstrate that CFC–12 is not used as a propellant. EPA will continue to examine the need to take action in the future regarding the remaining uses of CFCs in lubricants, coatings, and cleaning fluids.

In addition, one commenter suggested that the treatment of lubricants, coatings and cleaning fluids for electrical or electronic equipment in the proposed rule was ambiguous. The commenter requested clarification about the effect that the phrase "other than those specified above" in § 82.66(d) had on the treatment of these products.

In drafting the proposed rule, EPA intended to prohibit all aerosol uses of CFCs in lubricants, coatings, and cleaning fluids for electrical or electronic equipment except for the use of CFC–11 and CFC–113 for nonpropellant purposes in such products. The preamble to the January 16, 1992 NPRM clearly expressed this intent (as mentioned above, EPA has subsequently decided to include the use of CFC–12 for nonpropellant purposes in this exception). EPA acknowledges, however, that the use of the phrase "other than those specified above" in § 82.66(d) of the proposed rule did not clearly express this intent, because it could have been interpreted as excluding additional commercial uses of such cleaning fluids in certain electronic applications from coverage under the Class I ban. This was not EPA's intent. Consequently, in response to the commenter's request for clarification, the phrase "other than those specified above" has been changed to "other than those banned in § 82.64(a) or § 82.64(b)" in today's rulemaking.

e. *Spinnerette lubricant/cleaning spray.* In the proposed rule, EPA exempted several solvent applications of CFCs in certain aerosol products due to a lack of available substitutes. One exempted product category consisted of release agents for molds using CFC–11 or CFC–113 in the production of plastic and elastomeric materials. EPA received one comment requesting that a class of somewhat similar products, spinnerette lubricant/cleaning sprays used for synthetic fiber production, be exempted from the ban on aerosols and pressurized dispensers containing CFCs.

During the production of certain synthetic fibers such as acrylic, a silicone product is sprayed onto spinning blocks called spinnerettes. In certain applications, this aerosol product, containing CFC–114 as the solvent and silicone as the active ingredient, is used to both clean and lubricate the spinnerettes in order to remove unwanted residue which otherwise builds up on them. The formulation acts both as a lubricant and as a cleaning agent. Spinnerette lubricant/cleaning sprays currently contain CFCs, both as solvents and as propellants. CFC–114 is preferred as a solvent because it is nonflammable, nontoxic, and provides adequate dispersion of the active ingredient. CFC–12 is used as the propellant. The commenter estimates that its annual usage of CFC–114 is roughly 9,000 pounds per year.

Based on the information provided by the commenter, EPA evaluated spinnerette cleaning lubricant sprays against the criteria for nonessentiality and determined that: (1) Use of CFCs as solvents in these aerosol products should not be banned as nonessential products at this time, but that (2) use of CFCs as propellants do not warrant an exemption and, therefore, should be banned as nonessential products.

In making its determination, EPA examined the purpose and intended use of spinnerette lubricant/cleaning sprays. EPA acknowledges the importance of this product for the production of certain synthetic fibers and does not consider the use of spinnerette lubricant/cleaning sprays to be nonessential.

The commenter indicated that although research on alternatives is currently underway, no solvent substitute which is as safe and effective as the CFC–114 formulation for spinnerette lubricant/cleaning sprays is available at this time. However, several substitute formulations for the use of CFC–12 as a propellant have been identified including HCFCs and inert gases (e.g., carbon dioxide and nitrogen oxide). EPA believes, therefore, that adequate substitutes are available for CFC–12 as a propellant in spinnerette cleaning lubricants used for fiber production.

To ensure worker safety, spinnerette cleaning lubricants should be nonflammable and nontoxic. EPA believes that, while safe and effective non-CFC propellants are readily available, non-CFC solvent alternatives for CFC–114 may not be available for all applications at this time.

In making its determination, EPA also considered the economic impact of banning the use of CFC–114 in spinnerette lubricant/cleaning sprays. Since substitutes for the CFC–114 solvent in aerosol spinnerette lubricant/cleaning sprays are not readily available, banning these products could have a significant economic impact on the fiber-producing industries using this production method.

The excise tax on ozone-depleting compounds and the accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban. The industry is currently conducting research on such substitutes.

EPA has, therefore, decided to exempt the use of CFC–114 as a solvent in spinnerette lubricant/cleaning sprays from the ban on aerosol products and pressurized dispensers containing CFCs at this time. However, the use of CFC–12 as a propellant in this product is nonessential and, therefore, such use is banned.

f. *Plasma etching.* EPA received several comments requesting that EPA exempt the use of CFCs for plasma etching from the ban on aerosol products and pressurized dispensers containing CFCs.

One step in the manufacturing process of semiconductors and other microcomputer components requires the sub-micron etching of circuit lines on thin sheets of silicon crystal. This technology process, referred to as plasma or dry etching, uses various chlorine- and fluorine-containing chemicals as halide sources to create a plasma which is used to etch the silicon wafers within a sealed chamber. The chemicals used vary depending on the process and include CFCs, halons, carbon tetrachloride, and methyl chloroform. These ozone depleting substances are transformed into chemicals with no ozone depleting potential in the plasma etching process.

The chemicals used for this process are usually contained in stainless steel cylinders. Containers of low pressure substances, such as CFC–11 and methyl chloroform, are pressurized with nitrogen or carbon dioxide; containers of high pressure substances are self pressurized. Typically, hoses and other dispensing mechanisms are attached to the containers or cylinders prior to their use for plasma etching to allow the chemical to flow into the sealed chambers at carefully regulated rates.

Based on information provided by the commenters and after conducting further research into this process, EPA evaluated pressurized dispensers for plasma etching against the criteria for nonessentiality and determined that they should not be banned as nonessential products.

In making its determination, EPA examined the purpose and intended use of plasma etching. Pressurized dispensers containing CFCs for plasma etching provide an important function for the computer industry in the

manufacture of semiconductors and are not nonessential.

EPA also evaluated the availability of substitutes for the CFCs used in plasma etching. The Agency is aware that manufacturers are in the process of developing substitutes for the Class I substances currently used for plasma etching. The excise tax on ozone-depleting compounds and the accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban. However, no such substitutes are currently available for immediate use at economical prices. The cost of converting away from CFCs over a one-year period, as would be required if such uses were included in the ban on nonessential products—even if that conversion is technologically feasible—is economically prohibitive. Industry estimates suggest that costs would approach several million dollars per facility. Therefore, EPA does not consider that substitutes are available within the time frame of the nonessential products rule.

EPA is not aware of any safety or health considerations associated with the alternatives for CFCs in plasma etching. However, EPA is also aware that, since virtually all of the CFCs used for plasma etching are transformed, the ozone depleting potential of the CFCs used in making these products is destroyed in the plasma etching process. Consequently banning the use of CFCs in the plasma etching process would have an immeasurably small environmental benefit.

Due to the lack of available substitutes at this time, EPA has decided to include the use of CFCs for plasma etching in the list of products exempted from the ban on aerosol products and pressurized dispensers. The accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban. EPA encourages the industry to make a swift and efficient transition to these alternatives.

g. *Red pepper bear repellent spray.* EPA received one comment requesting that red pepper defensive spray used as a bear repellent be exempted from the ban on nonessential aerosol products containing CFCs. The commenter argued that its product did not meet EPA's criteria for nonessentiality and, thus, should not be banned.

Red pepper sprays are aerosol products used to temporarily disable an attacker. They contain an active ingredient (the essence of red pepper) that causes temporary blindness, breathing difficulties, and severe skin discomfort to animals or humans that come into contact with it. Red pepper sprays are used by individuals and law enforcement agencies for a variety of purposes ranging from personal protection to crowd control. In addition, bear repellent spray containing red pepper is used by campers, hikers, and park and forest service officials, most typically against charging grizzly bears. EPA is aware that CFC–113 is used as a solvent in at least one defensive spray. EPA is not aware of any other safety sprays containing CFCs as propellants.

CFC–113 is used as a solvent in at least one defensive spray. This product, developed as a bear repellent spray, uses CFC–113 to propel the active ingredient some distance and produce a large cloud of repellent fog that remains in the air long enough to affect a charging bear. The commenter argued that no available substitute could produce the necessary cloud of repellent at sufficient distance. The commenter also uses CFC–113 because it is nonflammable, nontoxic, and compatible with the active ingredient.

Based on information provided by the commenter and after conducting further research into this product, EPA evaluated red pepper sprays against the criteria for nonessentiality and determined that: (1) Use of CFCs as solvents in red pepper sprays used as bear repellent should not be banned; but that (2) use of CFCs as solvents in other safety sprays, including red pepper sprays, is nonessential; and (3) use of CFCs as propellants in all safety sprays is nonessential and, therefore, should be banned under this rule. An exemption to the ban is warranted only for the use of CFC–113 as a solvent in bear repellent sprays.

In making its determination, EPA examined the purpose and intended use of red pepper spray. EPA acknowledges that red pepper sprays serve an important nonfrivolous use and has not concluded that the use of red pepper sprays is nonessential. However, EPA has determined that the use of CFCs in red pepper sprays is, in most cases, unnecessary and is, therefore, nonessential.

EPA determined that adequate substitutes for CFCs in the production of red pepper spray were indeed available for all applications, with the possible exception of bear repellents. Several manufacturers produce non-CFC aerosol formulations of red pepper and other personal safety sprays for protection against humans. Solvents in these formulations include methyl chloroform, HCFC–141b, dimethyl ether, and water-based compounds. As a result, EPA has concluded that effective substitutes are available for the CFC solvent in red pepper and other safety sprays used against humans, and that use of CFCs in these red pepper sprays is nonessential. However, no manufacturer has formulated a non-CFC bear repellent spray that has been proven to be effective. The solvent use of CFCs in these products is necessary to allow the spray to travel long distances and produce adequate dispersion to stop a charging bear. Therefore, the Agency believes that substitutes may not be available for application against bears.

There are a number of safety and health issues associated with the possible substitutes for CFCs in the production of red pepper spray. EPA understands that, because of potential dangers posed to both the user and the intended target, formulations (including solvents) should be nontoxic and nonflammable. EPA believes that non-CFC formulations currently exist for most defensive sprays that are both effective and safe to use. However, since proven substitutes for CFC–113 in bear repellent have not been tested yet, EPA concluded that a safe and effective non-CFC formulation for bear repellent may not be available.

EPA acknowledges that the manufacturer producing the CFC formulation would suffer some economic impact as a result of this rulemaking (the company markets this product for use against humans as well). EPA believes, however, that given a 12-month period before the ban takes effect, the manufacturer will have sufficient opportunity to reformulate its product for use against humans with a substitute for the CFC solvent. However, since substitutes for CFC solvents in red pepper sprays used as bear repellent are not readily available at this time, banning these products could cause more significant economic injury for the manufacturer of this product. In any case, the manufacturer will have to convert to a non-CFC substitute soon, given the phaseout of CFC production by January 1, 1996 under the modified Montreal Protocol.

In conclusion, EPA will permit the continued use of CFC–113 as a solvent in red pepper sprays used as bear repellent. EPA believes, however, that it is not necessary to exempt other safety sprays, including red pepper sprays, for use against humans from the ban on nonessential products. Therefore, aerosol or pressurized dispensers of red pepper sprays containing CFCs which are not sold as bear repellent will be included in the ban. EPA has also determined that the use of CFC–12 as a

propellant in safety sprays is nonessential and, therefore, such use is banned. EPA will continue to examine the need to take action in the future to prohibit the remaining uses of CFCs in red pepper safety sprays as appropriate.

h. *Document preservation.* EPA received one comment requesting that processes and products used for the preservation of books and archival documents be exempted from the ban on aerosols and pressurized dispensers containing CFCs. Further research conducted by EPA determined that at least two manufacturers in the U.S. produce aerosol products which are used for document preservation.

Books, documents, and works of art on paper can be preserved through the application of a nonaqueous deacidification treatment which neutralizes existing acids in paper and increases its expected life for several hundred years. There are several application methods for this technology, including a dipping method, a liquified gas process conducted in an enclosed chamber, and an aerosol spray method. Most of the existing methods that have proven to be both safe and effective use CFC solvents (primarily CFC–113) to dissolve the preserving and alkalizing chemicals and/or act as carriers to transport them to the paper. CFC–113 is preferred because it is nonflammable, nontoxic, evaporates quickly, is nonreactive with the document material, and displays little or no tendency to dissolve inks, dyes, or bindings. EPA estimates that the production of aerosol document preservation sprays uses less than 10,000 pounds of CFCs per year.

Most documents at large institutions are preserved through a non-aerosol mass deacidification process. This method does not necessarily require the use of CFCs but is not generally available to outside users. However, the aerosol method, which involves spraying the preserving chemicals directly onto documents through an aerosol can or pressurized dispenser, is the only method that is appropriate and affordable for extremely delicate or valuable documents or for occasional and small volume users such as librarians, conservators, and archivists. Due to the risk of loss or irreparable damage, transportation of documents to centralized deacidification facilities may often not be possible.

Based on the information provided by the commenter and by other manufacturers of this product, EPA evaluated document preservation sprays against the criteria for nonessentiality and determined that the products should not be banned as nonessential products at this time.

In making its determination, EPA examined the purpose and intended use of document preservation sprays. EPA acknowledges the importance of this product for preserving valuable and historic documents and does not consider the use of document preservation sprays to be nonessential.

Manufacturers have indicated that no substitute which is as safe and effective as the CFC formulation for aerosol document preservation sprays is available at this time. The excise tax on ozone-depleting compounds and the accelerated phaseout will force manufacturers to adopt alternatives within a relatively short period of time regardless of the nonessential products ban. EPA is aware that at least one manufacturer is currently in the process of developing a non-CFC formulation for its aerosol deacidification product. Development of this formulation is, however, in the early stages, and the technology has not yet been demonstrated to be effective in the field. EPA believes, therefore, that safe and effective solvent substitutes have not yet been found.

To protect the safety of both the user and the document to be preserved, document preservation sprays should be nonflammable and nontoxic. EPA believes that safe and effective alternatives for CFC–113 in document preservation sprays are not available at this time.

In making its determination, EPA also considered the impact on society of banning this product. Since non-CFC substitutes for CFC–113 in document preservation sprays are not readily available, banning this use of CFC–113 would eliminate a product which may be the only preservation technology available to occasional and small volume users. EPA acknowledges that, if these preservation sprays were banned, many valuable documents might not be preserved. The deterioration of many of these documents would result in a loss to society that, although difficult to measure, would be significant.

EPA has, therefore, decided to exempt the use of CFC–113 in document preservation sprays from the ban on aerosol products and pressurized dispensers containing CFCs. EPA does not believe that this product is a nonessential product under the criteria specified in Section 610. EPA will, however, continue to examine the need to take action in the future to prohibit the use of CFCs in document preservation sprays should substitutes be developed.

4. Medical Products

The proposed rule exempted certain medical products from the ban, but it requested comments on the need for continued CFC use in medical products.

The Agency received many comments regarding the omission from the regulatory language of certain products that have been declared essential uses of CFCs by the Food and Drug Administration (FDA). One commenter recommended that all products listed as essential by the FDA should be exempted from the ban. The EPA wants to clarify that it is indeed the Agency's intent to exempt all products listed as essential by the FDA in 21 CFR 2.125. With that end in mind, the final rule was re-written to reference 21 CFR 2.125 rather than to list specific uses. Today's final rule exempts the sale or distribution of CFCs in the medical products listed in 21 CFR 2.125. EPA will continue to work in close cooperation with the FDA to monitor the relevant developments in technology and to evaluate the need for CFCs in various medical applications. If, at some point in the future, the FDA removes a category of medical device from its list of essential uses of chlorofluorocarbons, that product will meet the criteria for nonessentially and be subject to the Class I ban. Other comments addressed the specific products described below.

Prior to the public comment period, EPA believed that the industry had phased out the use of CFCs for administering intrarectal hydrocortisone acetate and in anesthetic drugs for topical use on accessible mucous membranes of humans where a cannula is used for the application. As a result, it did not list these uses as exempt from the ban. The extensive information provided by two commenters sufficiently demonstrated the continued use of CFCs in these applications. These applications are still considered essential uses of CFCs by the FDA, and are so listed in 21 CFR 2.125. The final rule specifically excludes products listed in 21 CFR 2.125 from the nonessential products ban on Class I substances; consequently, these products are exempt from the nonessential products ban at this time.

Another commenter filed extensive comments regarding CFC use in metered dose inhalers (MDIs). EPA appreciates the detailed nature of the information presented on MDIs and is encouraged by research on alternative chemicals for use in MDIs. However, at this time, no alternative propellant has been approved by the FDA, and MDIs are still listed in 21 CFR 2.125 as essential uses

of CFCs. Consequently, under the final rule, metered dose inhalers are exempt from the nonessential products ban at this time.

One commenter applied for an exemption from the nonessential products ban for its topical anesthetic and vapocoolant products. Since the 1978 aerosol ban restricted only CFCs used as propellants, the use of CFCs as active ingredients in topical anesthetic and vapocoolants was not subject to the 1978 ban; however, in explaining the status of such products, the preamble to the 1978 ban expressed the FDA's intent to address topical anesthetic and vapocoolant products at a future date.

According to the commenter, its topical anesthetic and vapocoolant products fit the definition of medical devices under the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 321). The commenter alleged that when its topical anesthetic product is applied to human skin, it acts as a counter-irritant to block pain associated with muscle spasms.

The commenter also disputed the findings of the 1989 EPA report on alternative formulations for products which were exempted or excluded from the 1978 ban on the use of CFCs in aerosols products (see *Alternative Formulations*). The commenter claimed that the proposed replacement formula (HCFC–142b, HCFC–22 and ethanol), when applied to human skin, would produce temperatures in the range of –26 °C to –30 °C, resulting in frostbite. The commenter noted that the temperature of the proposed reformulation could be raised by increasing the proportion of HCFC–142b in the formulation, but that this change would increase the flammability risk significantly.

Finally, the commenter noted that FDA approval is necessary for the use of any alternative reformulation in medical devices, and that the FDA has not yet approved an alternative.

The EPA believes that the definition of medical device in section 601(8) of the Act applies to topical anesthetic and vapocoolant products. Consequently, the continued use of CFCs in this application is permitted by EPA until FDA takes further action with regard to such products. If and when FDA approves a safe and effective alternative formula for topical anesthetics, this product will no longer meet the statutory definition of medical device in section 601(8); at that time, EPA will consult the FDA and consider promulgating regulations to prohibit the sale, distribution, or offer of sale or distribution, in interstate commerce of topical anesthetic and vapocoolant products containing any ozone-depleting substance. EPA is encouraged to learn that the commenter is in the process of applying for FDA approval of a reformulation which does not require the use of either CFCs or HCFCs. EPA will continue to monitor these developments, and it may consider regulation of these products at a later date.

5. Residential Halon Fire Extinguishers

The Agency's request for comments on banning halon fire extinguishers for residential use produced a number of responses. Many commenters supported a ban on the sale and distribution of residential halon fire extinguishers, and a number of commenters encouraged EPA to take immediate action to remove halon fire extinguishers from store shelves; some commenters even urged EPA to ban the use of all fire extinguishers containing halons. Despite their differences, all of these commenters argued that substitutes were currently available for residential halon fire extinguishers, and that the need to reduce emissions of ozone-depleting chemicals was sufficient to justify banning these products.

Several other commenters opposed a ban on residential halon fire extinguishers, arguing that currently available alternatives were inadequate and that the threat posed to the environment by residential fire extinguishers was minimal. In addition, these commenters argued that including these products in the ban would have a significant adverse impact on manufacturers of halon fire extinguishers.

Based on the available information (see Background Document and various comments in Docket), EPA evaluated residential halon fire extinguishers against the criteria for nonessentiality and determined that they should not be currently considered nonessential products. Consequently, EPA has decided not to ban residential halon fire extinguishers at this time.

In making its determination, EPA examined the purpose and intended use of residential halon fire extinguishers. Fire extinguishers for residential use are critical home safety products. These products are clearly not frivolous.

Although there are alternatives to halon fire extinguishers commercially available for residential use, the commenters raised legitimate concerns about the suitability of these substitutes for all situations. EPA felt that the important safety function served by handheld residential fire extinguishers obligated the Agency to carefully evaluate the safety concerns associated with a ban on the sale and distribution of halon fire extinguishers for residential use. As a result of its research, however, EPA determined that adequate substitutes for halon fire extinguishers in most situations were indeed available. In fact, some of these substitutes are more effective than halons for certain types of fires, such as deep-seated fires (see Background Document). The Agency recognizes, however, that the continued use of these products suggests that in certain noncommercial applications, halon fire extinguishers do not meet the criteria for nonessentiality.

The health and safety issues associated with the possible substitutes for halon in residential fire extinguishers include the toxicity of the various chemicals and the health effects associated with the product's impact on stratospheric ozone depletion. EPA believes that excluding the effects of stratospheric ozone depletion, currently available substitutes provide an equivalent level of fire safety protection without posing any offsetting threat to safety or human health. When the health and environmental effects of stratospheric ozone depletion are considered as well, EPA believes that there is a compelling case to be made for phasing out halon fire extinguishers for residential use.

However, in making its determination to exclude halon fire extinguishers from the Class I nonessential products ban, EPA considered several other relevant factors as well. While the EPA believes that adequate substitutes for residential halon fire extinguishers currently exist for many uses, the Agency also believes that given the effective date of today's rulemaking, the scheduled increase in the excise tax on halons, and the imminent cessation of halon production under the accelerated phaseout, little environmental benefit would result from including residential halon fire extinguishers in the Class I nonessential products ban.

The dramatic increase in the tax on halons which takes effect January 1, 1994 should act as a strong incentive for manufacturers to expedite the phaseout of halons. EPA anticipates that the tax alone will significantly reduce sales of halon fire extinguishers for residential use. Moreover, halon fire extinguishers for residential use represent only a small fraction of total annual ODS emissions (far less than one percent of annual global ODP-weighted emissions).

At the time the NPRM was published, EPA believed that sufficient time remained to promulgate its final rule well before the November 15, 1992 effective date specified in the statute. Consequently, in developing the January

16, 1992 NPRM, the Agency believed that the practical effect of including residential halon fire extinguishers in the Class I nonessential products ban would be to accelerate the phaseout of these products by 14 months. One of the concerns expressed by EPA in the proposed rule was whether such an action would be worthwhile, considering the relatively short period of time during which the ban would have any impact. Since the NPRM was published, Congress has increased the tax on halons, and the Parties to the Montreal Protocol have agreed to phase out the production of halon in member countries, except for essential uses, by January 1, 1994. Given that the effective date of the ban for products identified under section 610(b)(3) in today's rulemaking nearly coincides with the January 1, 1994 increase in the excise tax and the ban on halon production under the Montreal Protocol, this concern is even more pertinent.

EPA believes that the combined effect of the excise tax and the accelerated phaseout will be to end the sale and distribution of halon fire extinguishers for residential use. Consequently, although EPA believes that adequate substitutes exist for halon in residential fire extinguishers in many situations, the Agency believes that the use of halon in these products will be addressed more effectively through the excise tax and the accelerated phaseout, and, thus, that regulation under section 610 is unnecessary. As a result, residential halon fire extinguishers are not included in the Class I nonessential products ban.

6. Other Uses

EPA received one comment requesting that expanded tobacco produced using CFC–11 as an expansion agent be included in the rule as a nonessential product.

The CFC–11 tobacco expansion process is a patented, physical process that uses CFC–11 to restore cured, aged tobacco to its original field volume. In this process, cured tobacco is impregnated with CFC–11. The impregnated tobacco is then brought in contact with hot air that causes the CFC–11 to vaporize and the tobacco to expand. The CFC–11 is then recovered by cooling and compressing. EPA is aware that other tobacco expansion methods used by tobacco companies include process using carbon dioxide, steam, and nitrogen. Carbon dioxide appears to be the most promising of these substitutes, as it can achieve the same expansion levels as the CFC–11 process. Additional information provided to EPA suggests that tobacco processors are currently engaged in converting from the CFC–11 process to the carbon dioxide process.

EPA investigated the possibility of banning the use of CFC–11 for tobacco expansion as a nonessential product due to the availability of substitutes. The Agency believes that, due to the commercial availability of substitutes for CFC–11 in this process, the use of CFC–11 in tobacco expansion is nonessential. However, as stated in section III.A.5., EPA believes it is inappropriate to ban products through this final rule that were not included in the proposed rule. Consequently, the use of CFCs in tobacco expansion is not banned as a nonessential product in today's rulemaking. Given that CFC production will end by January 1, 1996, EPA believes that there is a strong incentive for companies to convert all production processes to non-CFC methods. However, EPA will continue to examine the need to take action in the future to prohibit the use of CFC's for tobacco expansion.

IV. Summary of Today's Final Rule

This section briefly describes the provisions of today's final rule. Any changes made to the rule language as a result of the public comments are described. Various minor changes to the final rule that have been made for purposes of clarification are not described herein.

A. Authority

The authority citation remains the same as in the proposed rule.

B. Purpose (Section 82.60)

This section states that these rules implement sections 608 and 610 of the Clean Air Act Amendments of 1990 regarding emission reductions and the Class I nonessential products ban. There were no changes in this section based on public comment. Minor editing changes were made to improve clarity and consistency.

C. Definitions (Section 82.62)

This section contains the definitions of the terms "chlorofluorocarbon," "commercial," "consumer," "distributor," "product," and "release."

No major changes were made in this section of the rule since proposal, although the definitions of "distributor" and "commercial" were revised to reflect the changes made in section 82.68 in response to public comments regarding recordkeeping, verification of commercial status, and commercial identification numbers.

The definition of "chlorofluorocarbon" describes the Class I substances affected by this rule. The definition of "consumer" is intended to distinguish the ultimate purchaser, recipient or user of a product from a manufacturer, seller, or distributor. The definition of "product" is intended to describe an item or category of items affected by today's rulemaking. The definition of "release" is intended to identify products that are affected by today's rulemaking.

The definition of "commercial" is intended to identify purchasers who are not prohibited by the statute from buying cleaning fluids for electronic and electrical equipment. The definition of "distributor" is intended to identify individuals who have responsibilities in restricting the sale of CFC-containing cleaning fluids for electronic and photographic equipment to commercial users. The definitions of "distributor" and "commercial" were revised in response to public comment to include the sale of a product to another distributor. In addition, the definition of "commercial" was changed to include a government contract number as a commercial identification number in response to public comment. Other minor editing changes were made to improve clarity and consistency.

D. Prohibitions (Section 82.64)

The proposed rule contained one prohibition which, effective November 15, 1992, prohibited any person from selling, distributing, or offering to sell or distribute, in interstate commerce any product identified as being nonessential in § 82.66. The final rule differs from the proposed rule in that it implements the nonessential products ban with three prohibitions rather than one.

The first prohibition states that effective on February 16, 1993, no person may sell, distribute, or offer for sale or distribution, in interstate commerce any plastic party streamer or any noise horn which is propelled by a chlorofluorocarbon. This prohibition bans the sale, distribution, or offer of sale or distribution, of the products specifically mentioned in section 610(b)(1) of the Act. The effective date has been revised to reflect the actual publication date of today's rulemaking.

The second prohibition states that effective on February 16, 1993, no person may sell, distribute, or offer for sale or distribution, in interstate commerce any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon to anyone who does not provide proof that he or she is a commercial purchaser, as defined under section 82.62. This prohibition makes the sale, distribution, or offer of sale or distribution, in

interstate commerce of the products specifically mentioned in section 610(b)(2) of the Act to noncommercial purchasers unlawful, as required by the statute. The effective date has been revised to reflect the actual publication date of today's rulemaking.

The third prohibition states that effective on January 17, 1994, no person may sell, distribute, or offer for sale or distribution, in interstate commerce any product listed as nonessential in § 82.66(c) and § 82.66(d). This prohibition makes it unlawful to sell, distribute, or offer for sale or distribution, in interstate commerce any of the products determined by the Administrator under section 610(b)(3) of the Act to be nonessential. The effective date has been revised to reflect the actual publication date of today's rulemaking, to facilitate the liquidation of existing inventories, and to allow manufacturers sufficient time to redesign and modify their production facilities and manufacturing processes, consistent with congressional intent.

E. Nonessential Products and Exceptions (Section 82.66)

The list of nonessential products in the final rule differs from the proposed rule with regard to exclusions for one foam product and several aerosol products or pressurized dispensers. In its January 16, 1992 NPRM, EPA specifically excluded several products from the proposed ban on aerosols and other pressurized dispensers containing CFCs. These products were: contraceptive vaginal foams; lubricants for pharmaceutical and tablet manufacture; metered dose inhalation devices; gauze bandage adhesives and adhesive removers; products using CFC–11 or CFC–113 as lubricants, coatings and cleaners for electrical or electronic equipment; products using CFC–11 or CFC–113 as lubricants, coatings and cleaners for aircraft maintenance uses; and products using CFC–11 and CFC–113 as release agents for molds used in the production of plastic and elastomeric materials (for additional information on these products, see Alternative Formulations and Background Document).

Today's rulemaking differs from the proposed rule in that the exclusions for contraceptive vaginal foams and metered dose inhalation devices, which were originally listed separately, have been replaced by a more general exclusion for all medical devices listed in 21 CFR 2.125(e); these products are included on that list. Intrarectal hydrocortisone acetate, anesthetic drugs for topical use on accessible mucous membranes of humans where a cannula is used for the application, and polymyxin B sulfate-bacitracin-zinc-neomycin sulfate soluble antibiotic powder without excipients for topical use on humans are also medical devices listed as essential uses of CFCs in 21 CFR 2.125(e) and are therefore excluded from the nonessential products ban at this time. In response to comments, topical anesthetic and vapocoolant products have also been excluded from the nonessential products ban, as have products using CFC–12 for nonpropellant purposes in lubricants, coatings or cleaning fluids for electrical or electronic equipment. Spinnerette lubricant/cleaning sprays that contain CFC–114 and are used in the production of synthetic fibers have also been excluded from the nonessential products ban, as have products using CFC–113 in document preservation sprays and bear repellent sprays, and the use of CFCs in plasma etching. In addition, in response to public comment, the Agency has excluded the use of flexible and packaging foam in the manufacture of coaxial cable from the Class I products ban at this time. Other minor editing changes were made to improve clarity and consistency.

F. Verification, Public Notice, and Recordkeeping Requirements (Section 82.68)

The January 16, 1992 NPRM presented four options for restricting the sale of these products to commercial users, and proposed transaction-specific recordkeeping requirements to help ensure compliance with the prohibition on the sale of cleaning fluids for noncommercial electronic and photographic equipment.

The final rule differs from the proposed rule in that recordkeeping requirements for distributors of CFC-containing cleaning fluids for electronic and photographic equipment have been eliminated. Distributors need not maintain records of transactions involving these products; instead, distributors must verify that purchasers are commercial users, and they must post a sign stating that the sale of these products for noncommercial use is prohibited.

V. Effective Dates

The effective date for the proposed rule was November 15, 1992. This final rule differs from the proposed rule in that it makes it unlawful to sell, distribute, or offer to sell or distribute, in interstate commerce the products specifically mentioned in 40 CFR section 82.66(a) effective on February 16, 1993. This rule also restricts the sale, distribution, or offer of sale or distribution, in interstate commerce of the products specifically mentioned in 40 CFR section 82.66(b) effective on February 16, 1993, and it bans the sale, distribution, or offer of sale or distribution, in interstate commerce of the products identified in 40 CFR 82.66(c) and 82.66(d) as nonessential effective on January 17, 1994.

VI. Judicial Review

Under section 307(b)(1) of the Clean Air Act, EPA hereby finds that these regulations are of national applicability. Accordingly, judicial review of this action is available only by the filing of a petition for review in the United States Circuit Court of Appeals for the District of Columbia Circuit within 60 days of publication. Under section 307(b)(2) of the Act, the requirements that are the subject of today's rule may not be challenged later in judicial proceedings brought to enforce these requirements.

VII. Summary of Supporting Analyses

A. Executive Order 12291

Executive Order (E.O.) 12291 requires the preparation of a regulatory impact analysis for major rules, defined by the order as those likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has determined that this proposed regulation does not meet the definition of a major rule under E.O. 12291 and has therefore not prepared a formal regulatory impact analysis. EPA has instead prepared a background document (see Background Document), which includes a qualitative study of the economic impact of this proposed regulation for each product identified as nonessential and prohibited from sale or distribution.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis

(RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

The Administrator believes that the regulation will not have a significant impact on a substantial number of small entities and has therefore concluded that a formal RFA is unnecessary. A qualitative treatment of potential impacts on small entities is included in EPA's background document accompanying this regulation.

EPA believes that most companies in the industries affected by this regulation have already ceased using CFCs in the affected products. In addition, EPA believes that the rising excise tax and the scarcity resulting from the required incremental reductions of these substances will provide a continually increasing incentive to switch to substitutes for those companies that have not already done so. EPA also believes that the prohibition of sales to noncommercial users in the case of the products identified in section 82.66(b) of today's rulemaking (CFC-containing cleaning fluids for electronic and photographic equipment) allows manufacturers, distributors, and retailers to continue to market those products to commercial users with little or no impact. Moreover, EPA would like to point out that the phaseout in the year 2000 of the production and import of Class I substances provides a *de facto* ban on all products using these substances. Regardless of the nonessential products ban, the phaseout will force manufacturers to adopt non-CFC alternatives in the near future. Since the publication of the proposed rule, the Parties to the Montreal Protocol have agreed to phase out production of Class I substances by January 1, 1996, and the President has announced plans to accelerate the phaseout under section 606 of the Clean Air Act, as amended (see section I.G. of today's preamble); such action will reduce the impact of today's rulemaking even more. EPA will consider the economic impact of the accelerated phaseout in its rulemaking to carry out its obligations under the Montreal Protocol. Consequently, EPA anticipates that the economic impact of today's rulemaking will be minimal.

For the purposes of this regulation, EPA believes that identifying companies by Standard Industrial Classification (SIC) code is inappropriate, because most of the affected products represent only a small fraction of the products within each SIC code. In addition, since most manufacturers have already ceased using Class I substances, only a few companies within each classification currently manufacture products containing CFCs. Due to the small number of potentially affected companies within each industry, the definition of companies as large or small is based for the most part on the characterization of manufacturing process by industry contacts, rather than on a standardized measure such as number of employees.

C. Paperwork Reduction Act

There are no information collection requirements in this rule. The proposed rule contained recordkeeping requirements associated with the sale of chlorofluorcarbon-containing cleaning fluids for electronic and photographic equipment, but these requirements have been eliminated in the final rule in favor of a public disclosure requirement. No Information Collection Request (ICR) is required for a public disclosure requirement. The Information Collection Request document prepared by EPA under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, for the proposed rule (ICR No. 1592.01) is contained in the Docket for this rulemaking. A copy may be obtained by writing to the Information Policy Branch, U.S. Environmental Protection Agency, 401 M Street, SW. PM–223Y; Washington, DC 20460 or by calling (202) 260–2740.

VIII. References

United Nations Environment Programme. Aerosols, Sterilants and Miscellaneous Uses of CFCs: Report by the Technical Options Committee (June 30, 1989).

United Nations Environment Programme. Environmental Effects Panel Report (1989).

United Nations Environment Programme. Final Report of the Halons Technical Options Committee (August 11, 1989).

United Nations Environment Programme. Flexible and Rigid Foams Technical Options Report (June 30, 1989).

United States Environmental Protection Agency. Alternative Formulations to Reduce CFC Use in U.S. Exempted and Excluded Aerosol Products (November 1989).

United States Environmental Protection Agency. Background Document on Identification of Nonessential Products that Release Class I Substances (July 1, 1991).

United States Environmental Protection Agency. Essential Use Determination—Revised: Support Document Fully Halogenated Chlorofluoroalkanes (March 17, 1978).

United States Environmental Protection Agency. Handbook for Reducing and Eliminating Chlorofluorocarbons in Flexible Polyurethane Foams (April 1991).

United States Environmental Protection Agency. Response to Comments for Proposed Rule on Nonessential Products Made with Class I Substances (October 30, 1992).

List of Subjects in 40 CFR Part 82

Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Clean Air Act Amendments of 1990, Exports, Imports, Nonessential products, Recordkeeping and reporting requirements, Stratospheric ozone layer.

Dated: December 31, 1992.

William K. Reilly,

Administrator.

Title 40, Code of Federal Regulations, part 82, is amended to read as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671(q).

2. A new subpart C is added to read as follows:

Subpart C—Ban on Nonessential Products Containing Class I Substances

Sec.

§ 82.60 Purpose.

The purpose of this subpart is to implement the requirements of sections 608 and 610 of the Clean Air Act Amendments of 1990 on emission reductions and nonessential products.

§ 82.62 Definitions.

For purposes of this subpart:

(a) *Chlorofluorocarbon* means any substance listed as Class I group I or Class I group III part 82, appendix A to subpart A.

(b) *Commercial*, when used to describe the purchaser of a product, means a person that has one of the following identification numbers:

(1) A federal employer identification number;

(2) A state sales tax exemption number;

(3) A local business license number; and

(4) A government contract number and that uses the product in the purchaser's business or sells it to another person.

(c) *Consumer*, when used to describe a person taking action with regard to a product, means the ultimate purchaser, recipient or user of a product.

(d) *Distributor*, when used to describe a person taking action with regard to a product;

(1) Means the seller of a product or another distributor; or

(2) A person who sells or distributes that product in commerce for export from the United States.

(e) *Product* means an item or category of items manufactured from raw or recycled materials which is used to perform a function or task.

(f) *Release* means to emit into the environment during the manufacture, use, storage or disposal of a product.

§ 82.64 Prohibitions.

(a) Effective on February 16, 1993, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products identified as being nonessential in § 82.66(a).

Effective on February 16, 1993, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products specified in § 82.66(b) to a person who does not provide proof of being a commercial purchaser, as defined under § 82.62.

(c) Effective on January 17, 1994, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products identified as being nonessential in § 82.66(c) or § 82.66(d).

§ 82.66 Nonessential products and exceptions.

The following products which release a Class I substance (as defined in part 82, appendix A to subpart A) are identified as being nonessential, and subject to the prohibitions specified under § 82.64:

(a) Any plastic party streamer or noise horn which is propelled by a chlorofluorocarbon, including but not limited to:

(1) String confetti;

(2) Marine safety horns;

(3) Sporting event horns;

(4) Personal safety horns;

(5) Wall-mounted alarms used in factories or other work areas; and

(6) Intruder alarms used in homes or cars.

(b) Any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon:

(1) Including but not limited to liquid packaging, solvent wipes, solvent sprays, and gas sprays; and

(2) Except for those sold or distributed to a commercial purchaser.

(c) Any plastic flexible or packaging foam product which is manufactured with or contains a chlorofluorocarbon;

(1) Including but not limited to:

(i) Open cell polyurethane flexible slabstock foam;

(ii) Open cell polyurethane flexible molded foam;

(iii) Open cell rigid polyurethane poured foam;

(iv) Closed cell extruded polystyrene sheet foam;

(v) Closed cell polyethylene foam; and

(vi) Closed cell polypropylene foam.

(2) Except—flexible or packaging foam used in coaxial cable.

(d) Any aerosol product or other pressurized dispenser, other than those banned in § 82.64(a) or § 82.64(b), which contains a chlorofluorocarbon;

(1) Including but not limited to household, industrial, automotive and pesticide uses;

(2) Except—(i) Medical devices listed in 21 CFR 2.125(e);

(ii) Lubricants for pharmaceutical and tablet manufacture;

(iii) Gauze bandage adhesives and adhesive removers;

(iv) Topical anesthetic and vapocoolant products;

(v) Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain CFC–11, CFC–12, or CFC–113 for solvent purposes, but which contain no other CFCs;

(vi) Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain CFC–11 or CFC–113, but which contain no other CFCs;

(vii) Mold release agents used in the production of plastic and elastomeric materials, which contain CFC–11 or CFC–113, but which contain no other CFCs;

(viii) Spinnerette lubricant/cleaning sprays used in the production of synthetic fibers, which contain CFC–114, but which contain no other CFCs;

(ix) Containers of CFCs used as halogen ion sources in plasma etching;

(x) Document preservation sprays which contain CFC–113, but which contain no other CFCs; and

(xi) Red pepper bear repellent sprays which contain CFC–113, but which contain no other CFCs.

§ 82.68 Verification and public notice requirements for distributors of certain products intended exclusively for commercial use.

(a) Effective on February 16, 1993, any person who sells or distributes any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon must verify that the purchaser is a commercial entity as defined in § 82.62. In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must be presented with documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62. The seller or distributor must have a reasonable basis for believing that the information presented by the purchaser is accurate.

(b) Effective on February 16, 1993, any person who sells or distributes any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon must prominently display a sign where sales of such product occur which states: "It is a violation of federal law to sell, distribute, or offer to sell or distribute, any chlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per sale. Individuals purchasing such products must present proof of their commercial status in accordance with 40 CFR 82.68(a)."

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